

REDACTED - FOR PUBLIC INSPECTION

LAW OFFICES

BLOOSTON, MORDKOFKY, DICKENS, DUFFY & PRENDERGAST, LLP

2120 L STREET, NW

WASHINGTON, DC 20037

(202) 659-0830

FACSIMILE: (202) 828-5568

BENJAMIN H. DICKENS, JR.
JOHN A. PRENDERGAST
GERARD J. DUFFY
RICHARD D. RUBINO
MARY J. SISAK
D. CARY MITCHELL
SALVATORE TAILLEFER, JR.

ARTHUR BLOOSTON
1914 – 1999

AFFILIATED SOUTH AMERICAN OFFICES

ESTUDIO JAUREGUI & ASSOCIATES
BUENOS AIRES, ARGENTINA

HAROLD MORDKOFKY
OF COUNSEL

EUGENE MALISZEWSKYJ
ENGINEERING CONSULTANT

February 21, 2018

WRITER'S CONTACT INFORMATION

bhd@bloostonlaw.com

202-828-5510

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

RE: Notice of *Ex Parte* Presentation in WC Docket No. 18-41
Petition for Declaratory Ruling of South Dakota Network, LLC

Dear Ms. Dortch:

Pursuant to §0.457 and §0.459 of the Commission's rules, South Dakota Network, LLC ("SDN"), by its attorneys, hereby requests that certain materials and information be withheld from public inspection. Specifically, SDN requests confidential treatment of an agreement attached to its Notice of *Ex Parte* Presentation. In support of its request for confidential treatment and pursuant to the requirements under § 0.459(b) of the Commission's rules, SDN states the following:

1. *Identification of the specific information for which confidential treatment is sought.*

SDN seeks confidential treatment of the agreement included in the attachments to its Notice of *Ex Parte* Presentation ("Confidential Information").

2. *Identification of the Commission proceeding in which the information was submitted or description of the circumstances giving rise to the submission.*

The Confidential Information is being submitted in connection with SDN's Petition for Declaratory Ruling, WC Docket No. 18-41.

3. *Explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged.*

The Confidential Information is sensitive commercial information which constitutes trade secrets or sensitive commercial and financial information that "would customarily be guarded from

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competitors,”¹ and is therefore exempted from mandatory disclosure under FOIA Exemption 4 and Section 0.457(d) of the Commission's rules.²

4. *Explanation of the degree to which the information concerns a service that is subject to competition.*

The Confidential Information relates directly to terminating access services provided by SDN that is subject to competition from competitive local exchange carriers.

5. *Explanation of how disclosure of the information could result in substantial competitive harm.*

Disclosure of the Confidential Information is likely to result in substantial competitive harm to SDN because the Confidential Information could provide competitors with commercially sensitive insights related to SDN's operations, service offerings, and costs.

6. *Identification of any measures taken by the submitting party to prevent unauthorized disclosure.*

SDN does not make the Confidential Information publically available in any way and further limits internal access to key employees subject to strict non-disclosure obligations.

7. *Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties.*

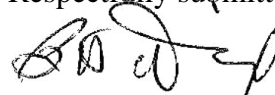
The Confidential Information has been filed subject to protective order in the Fifth Circuit Court in Brown County, South Dakota.

8. *Justification of the period during which the submitting party asserts that the material should not be available for public disclosure.*

The Confidential Information should be treated as confidential for an indefinite period, as there are substantial competitive harms associated with the disclosure of the confidential information.

Please direct any questions regarding this submission to the undersigned.

Respectfully submitted,



Benjamin H. Dickens, Jr.

Counsel for South Dakota Network, LLC

¹ *Id.* § 0.457(d)(2).

² 5 U.S.C. § 552(b)(4); 47 C.F.R. § 0.457(d).

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February 21, 2018

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bhd@bloostonlaw.com

202-828-5510

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notice of *Ex Parte* Presentation in WC Docket No. 18-41
Petition for Expedited Declaratory Ruling of South Dakota Network, LLC

Dear Ms. Dortch:

On February 16, 2018, South Dakota Network, LLC ("SDN") met William Scher of the Office of General Counsel. SDN's counsel, Benjamin H. Dickens, Jr., Mary J. Sisak, and Salvatore Taillefer, Jr., attended the meeting on behalf of SDN. In the meeting, SDN discussed its Petition for Expedited Declaratory Ruling and related filings in its South Dakota state court proceeding against James Valley Cooperative Telephone Company, James Valley Communications, Inc., and Northern Valley Communications, LLC. Specifically, SDN discussed the Commission's jurisdiction to address the issues raised in its Petition and the Office of General Counsel's ability to address the issues raised in the request for amicus brief to the South Dakota court, as set out in the Petition. SDN also discussed the Order to Show Cause and related Motion recently filed in the South Dakota court proceeding (attached).

Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter is being filed via ECFS. If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,



Benjamin H. Dickens, Jr.

Counsel to South Dakota Network, LLC

CC: William Scher

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STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF BROWN

FIFTH JUDICIAL CIRCUIT

JAMES VALLEY COOPERATIVE
TELEPHONE COMPANY, a South Dakota
cooperative; JAMES VALLEY
COMMUNICATIONS, INC., a South Dakota
corporation; and NORTHERN VALLEY
COMMUNICATIONS, L.L.C., a South
Dakota limited liability company,

Plaintiffs,

v.

SOUTH DAKOTA NETWORK, LLC, a South
Dakota limited liability company,

Defendant.

06CIV15-000134

**NOTICE OF ENTRY
OF ORDER TO SHOW CAUSE**

TO: Defendants

NOTICE IS HEREBY GIVEN, pursuant to SDCL 15-6-5(d), that attached hereto is a copy of the *Order to Show Cause*, the original of which was filed and entered in the office of the Clerk of the Circuit Court, Brown County, South Dakota, on the 14th day of February, 2018.

Dated this 14th day of February, 2018.

BANTZ, GOSCH & CREMER, L.L.C.

/s/ James M. Cremer

James M. Cremer
305 Sixth Avenue SE; P.O. Box 970
Aberdeen, SD 57402-0970
605-225-2232
605-225-2497 (fax)
jcremer@bantzlzlaw.com

CERTIFICATE OF SERVICE

The undersigned attorney for Plaintiffs hereby certifies that on the 14th day of February, 2018, a true and correct copy of the foregoing **Notice of Entry of Order to Show Cause** was filed electronically with the Clerk of Court through the Odyssey File & Serve, and electronically served to the following through Odyssey File & Serve:

Darla Pollman Rogers
Margo D. Northrup
Riter, Rogers, Wattier & Northrup, LLP
319 S. Coteau Street
P.O. Box 280
Pierre, SD 57501-0280
dprogers@riterlaw.com
m.northrup@riterlaw.com

Meredith A. Moore
Jonathan A. Heber
Cutler Law Firm, LLP
100 N. Phillips Avenue, 9th Floor
P.O. Box 1400
Sioux Falls, SD 57101-1400
meredithm@cutlerlawfirm.com
jonathanh@cutlerlawfirm.com

Brian J. Donahoe
Donahoe Law Firm, P.C.
401 E. 8th Street, Suite 215
Sioux Falls, SD 57103-7008
brian@donahoelawfirm.com

BANTZ, GOSCH & CREMER, L.L.C.

/s/ James M. Cremer

James M. Cremer
Attorneys for Plaintiffs
305 Sixth Avenue SE; P.O. Box 970
Aberdeen, SD 57402-0970
605-225-2232
605-225-2497 (fax)
jcremer@bantzlzaw.com

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF BROWN

FIFTH JUDICIAL CIRCUIT

JAMES VALLEY COOPERATIVE
TELEPHONE COMPANY, a South
Dakota cooperative; JAMES VALLEY
COMMUNICATIONS, INC., a South
Dakota corporation; and NORTHERN
VALLEY COMMUNICATIONS, L.L.C.,
a South Dakota limited liability company,

Case No.: 06CIV15-000134

Plaintiffs,

ORDER TO SHOW CAUSE

v.

SOUTH DAKOTA NETWORK, LLC, a
South Dakota limited liability company,

Defendant.

Upon reviewing the Motion and Affidavit filed by Petitioner, Plaintiffs in this
action, attached hereto, and for good cause shown;

IT IS HEREBY ORDERED that the Respondent, South Dakota Network, LLC
("SDN"), appear in third floor Courtroom of this Court located in Aberdeen, Brown
County, South Dakota, on **the 21st day of February 2018, at 9:30 a.m.** and show cause,
if there be any, why it should not be held in contempt of Court for failure to comply with
the Order Approving Plaintiffs' Proposed Request Order for Amicus Curiae Brief from
the Federal Communications Commission (Aug. 24, 2017) ("Request Order"). If the
Respondent has reason as to why it was unable to comply with the Court's Request Order
cited above it should bring to the hearing those documents or witnesses necessary to
prove its claims.

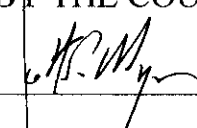
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IT IS FURTHER ORDERED that the Petitioner, must serve a copy of this Order to Show Cause, together with the Motion and Affidavit and all attachments upon the Respondent, SDN, on shortened notice at least four business days prior to the hearing set above to accommodate the expedited hearing date.

Attest:
Schmidt, Beth
Clerk/Deputy



BY THE COURT:


Circuit Court Judge

2/14/18

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STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF BROWN

FIFTH JUDICIAL CIRCUIT

JAMES VALLEY COOPERATIVE
TELEPHONE COMPANY, a South Dakota
cooperative; JAMES VALLEY
COMMUNICATIONS, INC., a South Dakota
corporation; and NORTHERN VALLEY
COMMUNICATIONS, L.L.C., a South
Dakota limited liability company,

Plaintiffs,

v.

SOUTH DAKOTA NETWORK, LLC, a
South Dakota limited liability company,

Defendant.

Case No.: 06CIV15-000134

**PLAINTIFFS' MOTION AND
AFFIDAVIT
FOR ORDER TO SHOW CAUSE**

COMES NOW, Plaintiffs, by their CEO, James Groft the Petitioner in this matter and after first being duly sworn on oath states and alleges as follows:

1. The Respondent, SDN, has willfully disobeyed an order of the Court set forth in this Motion and Affidavit for Order to Show Cause:

Following this Court's April 12, 2017 hearing on Defendant's Motion to Dismiss and Alternative Motion to Stay and Refer Issues to the Federal Communications Commission, this Court acknowledged that the FCC has primary jurisdiction over certain issues in this litigation with respect to Plaintiffs' dissolution claim. *See* Memorandum Decision on Defendant's Motion to Dismiss and Alternative Motion to Stay Proceedings and Refer Issues to the Federal Communications Commission and Motion to Strike or Exclude the Opinions of Warren Fischer, Michael Starkey, and Barry Bell (July 17, 2017) at 17-18. These issues included, and were limited to, (1) whether SDN violated the Federal Communications Act, (2) whether SDN's 2014 Cost Study violated federal tariff law, and (3) the legality of the SDN-AT&T Agreement. *See id.*

at 18. Consequently, on July 31, 2017, the Court ordered that SDN's Motion to Stay and Refer Issues to the FCC be granted, in part, but "only insofar as the parties may invite the FCC to provide an *amicus curiae* brief" via a letter, the contents of which needed to be submitted to the Court by both parties for its selection and approval. Order Granting, in Part, and Denying, in Part, Defendant's Motion to Dismiss and Alternative Motion to Stay Proceedings and Refer Issues to the Federal Communications Commission and Motion to Strike or Exclude the Opinions of Warren Fischer, Michael Starkey, and Barry Bell (July 31, 2017) at 2.

On August 22, 2017, the parties' competing submissions were presented to the Court, and on August 24, 2017, the Court made its selection via another Order. The Court ordered as follows:

1. Plaintiffs' proposed Request Order, and the form of the letter attached hereto as **Exhibit 1**, comport with those prior orders and are hereby approved;
2. The parties shall cooperate in executing the letter and delivering it to the Office of General Counsel of the Federal Communications Commission; and
3. If, for any reason, Defendant refuses to execute the letter within three business days of the execution of this Order, Plaintiff is authorized to submit the letter, together with this Order, to the Office of General Counsel of the Federal Communications Commission.

Order Approving Plaintiffs' Proposed Request Order for Amicus Curiae Brief from the Federal Communications Commission (Aug. 24, 2017) at 2 ("Request Order"). Plaintiffs sent the Court-approved letter to the FCC's Office of General Counsel ("OGC") on September 1, 2017, with a copy to Defendant's counsel.

2. A certified copy of the Request Order that is the subject of this Motion and Affidavit for Order to Show Cause is attached as **Exhibit 1**.

3. SDN had knowledge of this Court's Request Order because counsel for SDN attended the hearings to which the Orders pertained and was served with copies of the Orders. Specifically, SDN was notified of the Court's entry of the Request Order proffered by Plaintiffs, and the rejection of its competing order, via Odyssey and emails of counsel on August 25, 2017. *See Exhibits 2 and 3.*

4. SDN had the ability to comply with this Court's Request Order because it simply required *inaction* on SDN's part. SDN continues to have the ability to comply with the Court's Request Order by withdrawing its letter to the OGC and discontinuing any further effort to disrupt the OGC's consideration of the Court's *amicus* request.¹

5. SDN willfully disobeyed the Court's Request Order by openly inviting the OGC to ignore the Court's request to address the narrowly tailored list of topics contained in the letter seeking *amicus* briefing. On February 7, 2018, without providing notice to the Court or Plaintiffs, SDN sent a letter to the OGC. Letter from SDN to FCC Office of General Counsel (Feb. 7, 2018), attached as **Exhibit 4**. SDN served a copy of this letter on the Court and provided a copy to Plaintiffs' counsel for the first time on the evening of Friday, February 9, 2018. Specifically, SDN instructs the OGC that, "[r]ather than filing an *amicus* brief, the OGC should advise the Court to stay the NVC Lawsuit," *id.* at 2, and that the OGC "should not opine on the alleged undisputed facts and questions presented in Plaintiffs' September 1, 2017 letter." *Id.* at 7. SDN's efforts to derail the Court's *amicus* request constitutes "willful or contumacious

¹ Plaintiffs do not ask the Court to require SDN to withdraw its Petition for Declaratory Ruling, only its letter to the OGC. SDN may petition the FCC to ask that it initiate a notice-and-comment process to change the rules and Plaintiffs will address that issue through the appropriate regulatory channels. But SDN may *not* (1) defy the Court's Referral Order by asking the OGC to rebuff the Court's request; or (2) wait over three years to initiate such a proceeding and then use it as justification for delaying resolution of Plaintiffs' claims in this case.

disobedience" of the Court's Request Order. *Harksen v. Peska*, 2011 S.D. 75, ¶ 12, 630 N.W.2d 98.

THEREFORE, based on the foregoing statement and allegations, Plaintiffs respectfully request that the Court enter an Order to Show Cause requiring SDN to attend a hearing and show cause as to why it should not be held in contempt for its willful violation of the Request Order.

Dated: February 14, 2018

James Valley Cooperative Telephone Company,
James Valley Communications, Inc. and Northern
Valley Communications, LLC, Plaintiffs

By: James Groft
James Groft, CEO

State of South Dakota)
)
County of Brown)

On this 14th day of February, 2018, I swear under oath that the allegations set forth in this Affidavit are true and correct to the best of my knowledge, and that I believe that Plaintiffs are entitled to the relief requested for, and that this legal action is not filed for harassment, abuse of process, or delay.

James Groft
James Groft

Signed and sworn to before me this 14th day of February, 2018.

Larry A. Bercler

(SEAL)

My commission expires: 9-21-22

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF BROWN

FIFTH JUDICIAL CIRCUIT

JAMES VALLEY COOPERATIVE
TELEPHONE COMPANY, a South Dakota
cooperative; JAMES VALLEY
COMMUNICATIONS, INC., a South Dakota
corporation; and NORTHERN VALLEY
COMMUNICATIONS, L.L.C., a South
Dakota limited liability company,

Plaintiffs,

v.

SOUTH DAKOTA NETWORK, LLC, a South
Dakota limited liability company,

Defendant.

06CIV15-000134

**ORDER APPROVING
PLAINTIFFS' PROPOSED
REQUEST ORDER
FOR AMICUS CURIAE BRIEF
FROM THE FEDERAL
COMMUNICATIONS COMMISSION**

In the Court's July 31, 2017, Order Granting, In Part, and Denying, In Part, Defendant's Motion to Dismiss and Alternative Motion to Stay Proceedings and Refer Issues to the Federal Communications Commission, the Court acknowledged that the Federal Communications Commission ("FCC") has primary jurisdiction in determining whether Defendant violated the Federal Communications Act, including the legality of the SDN/AT&T agreement and the cost study and alleged violations of tariffs. The Court granted Defendant's Alternative Motion to Stay and Refer Issues to the Federal Communications Commission only insofar as it permitted the parties to invite the FCC to provide an *amicus curiae* brief. The Court ordered the parties to meet and confer regarding the terms of a Request Order, and, in the event they could not reach an agreement, to submit to this Court their respective proposed Request Orders. The parties agreed that such orders would be submitted on or before August 22, 2017.

The Court has now received competing Request Orders submitted by the parties.

Pursuant to the Court's Memorandum Opinion of July 17, 2017, and the Court's July 31, 2017,

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James Valley Cooperative Telephone Company et al. v. South Dakota Network, LLC et al.
Brown County Civ. 15-134
Order Approving Plaintiffs' Proposed Request Order for Amicus Curiae Brief from the Federal Communications Commission

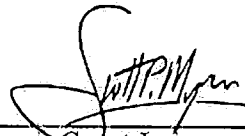
Order Granting, In Part, and Denying, In Part, Defendant's Motion to Dismiss and Alternative
Motion to Stay Proceedings and Refer Issues to the Federal Communications Commission,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiffs' proposed Request Order, and the form of the letter attached hereto as **Exhibit 1**, comport with those prior orders and are hereby approved;
2. The parties shall cooperate in executing the letter and delivering it to the Office of General Counsel of the Federal Communications Commission; and
3. If, for any reason, Defendant refuses to execute the letter within three business days of the execution of this Order, Plaintiff is authorized to submit the letter, together with this Order, to the Office of General Counsel of the Federal Communications Commission.

BY THE COURT:

Signed: 8/24/2017 2:23:05 PM



Circuit Court Judge

Attest:
Walberg, Peggy
Clerk/Deputy



STATE OF SOUTH DAKOTA
Fifth Judicial Circuit Court
I hereby certify that the foregoing instrument
is a true and correct copy of the original as the
same appears on file in my office on this date:

FEB 13 2018

Marla R. Zastrow
Brown County Clerk of Courts

By: 

August __, 2017

VIA EMAIL

Jennifer Tatel, Esq.
Acting General Counsel
Federal Communications Commission
445 12th Street SW
Washington, DC 20554
(202) 418-1740
fcc litigation@fcc.gov

Re: *James Valley Cooperative Telephone Company, James Valley Communications, Inc., and Northern Valley Communications, L.L.C. v. South Dakota Network, LLC*, Civ. 15-134 (Brown County, SD Cir. Ct.): Invitation to Submit an *Amicus* Brief

Dear Ms. Tatel:

The undersigned are counsel to the parties in the above-captioned litigation. We write jointly in response to an order released by the Hon. Scott P. Myren, Circuit Judge, in the litigation directing the parties to invite the Federal Communications Commission to submit an *amicus* brief on certain discrete legal issues that are relevant to one of Plaintiffs' claims against South Dakota Network, LLC ("SDN"), a Commission-approved Centralized Equal Access ("CEA") Provider.¹

We note that while the Court entertained a motion asking for the case to be stayed and referred to the FCC, the Court opted instead to seek the Commission's view through *amicus* briefing on discrete questions that are narrowly tailored and framed as legal questions. The Commission's response to these questions will guide the Court in making determinations relevant to questions that remain pending before the Court, specifically whether Plaintiffs are entitled to seek dissolution or judicial intervention in the affairs of SDN in light of alleged violations of the FCC's rules governing the provision and tariffing of CEA services.

¹ See *James Valley Cooperative Telephone Company, James Valley Communications, Inc., and Northern Valley Communications, L.L.C. v. South Dakota Network, LLC*, Civ. 15-134, Memorandum Decision on Defendant's Motion to Stay Proceedings and Refer Issues to the Federal Communications Commission and Motion to Strike or Exclude the Opinions of Warren Fischer, Michael Starkey, and Barry Bell (Brown Cty. S.D. Cir. Ct. July 17, 2017), at 16-18, attached hereto as **Exhibit A**.

The relevant and undisputed facts are as follows:

1. As an FCC-sanctioned CEA provider,² SDN's interstate switched access tariff contains rates developed pursuant to part 61.38 of the Commission's rules governing rate-of-return carriers.
2. In September 2014, SDN entered into a contract with AT&T Corp. to provide AT&T with tandem switching and transport services for rates below those contained in SDN's FCC-filed tariff (the "SDN/AT&T Agreement").³
3. Neither AT&T nor SDN filed the SDN/AT&T Agreement with the Commission or otherwise made it publicly available.
4. The SDN/AT&T Agreement requires SDN to provide AT&T with "High Volume Switching and Transport Service," for long distance traffic AT&T terminates to Northern Valley Communications, LLC ("Northern Valley").
5. [REDACTED]
6. [REDACTED]
7. Northern Valley is a CLEC that provides services to residential and business customers in and around Aberdeen, South Dakota. Northern Valley also provides services to high-volume customers, including conference call providers. Northern Valley has a switched access tariff on file with the Commission and mirrors the rates in CenturyLink's tariff, as provided by the Commission's rules governing tariffed rates for CLECs engaged in access stimulation.

The Court has invited the Commission to provide an *amicus* brief responding to the following question:

For the period September 2014 to present, have the FCC's rules permitted an FCC-approved Centralized Equal Access Provider to provide tandem-switching services to an IXC pursuant to a private, unfiled contract, at a rate that is below the rate contained in the CEA Provider's FCC-filed tariff?

² See *In re: SDCEA, Inc. to Lease Transmission Facilities to Provide Centralized Equal Access Service to Interexchange Carriers in the State of South Dakota*, Memorandum Opinion, Order and Certificate, 5 FCC Rcd. 6978, DA 90-1654 (rel. Nov. 21, 1990).

³ AT&T/SDN Service Agreement, Confidential, September 18, 2014, attached as **Exhibit B**.

⁴ SDN Tariff F.C.C. No. 1, 7th Revised Page 134, attached as **Exhibit C** (Eff. July 1, 2014) (Access Transport rate is \$0.006001 and Centralized Equal Access is \$0.005802).

⁵ SDN Tariff F.C.C. No. 1, 8th Revised Page 134, attached as **Exhibit D** (Eff. July 1, 2016) (Access Transport rate is \$0.006001 and Centralized Equal Access is \$0.005122).

To the extent that the Commission answers the prior question in the negative, what portion(s) of the Communications Act or Commission rules are implicated by SDN's decision to enter into the unfiled, off-tariff contract with AT&T?

In addition to the issue of SDN's unfiled contract with AT&T, Plaintiffs have also learned that in preparation of SDN's 2014 CEA cost study, SDN significantly reduced the projected traffic volumes that would be switched by its tandem switch. The undisputed facts are as follows:

1. In its 2012 Tariff Review Plan, SDN projected it would switch 837,258,000 minutes⁶ of interstate long distance traffic for the study period.
2. In its 2014 Tariff Review Plan, SDN projected only 370,269,443 minutes⁷ of interstate long distance traffic for the study period.
3. A primary reason for SDN reducing the projected volumes is because AT&T had been withholding payment from SDN and SDN was preparing to enter into the off-tariff contract with AT&T described above.
4. AT&T's traffic to Northern Valley has continued to be switched by SDN's tandem switch after SDN entered into the SDN/AT&T contract.

Therefore, the Court has invited the Commission to provide an *amicus* brief responding to the following additional question:

Did SDN violate the Commission's rules governing rate development as an FCC-approved CEA provider by omitting traffic volumes related to AT&T traffic from its 2014 cost study, even though AT&T's traffic continued to be switched by SDN's tandem switch?

To the extent that the Commission answers the prior question in the affirmative, what portion(s) of the Communications Act or Commission rules are implicated by SDN's 2014 cost study filing?

We appreciate the assistance of your office in responding to these questions based on existing FCC law and look forward to your response. Should you require any additional information, please do not hesitate to contact the undersigned.

⁶ See, e.g., South Dakota Network, LLC, Tariff F.C.C. No. 1., Centralized Equal Access Service, 2012 Annual Access Tariff Filing, Description and Justification, at 3, attached as **Exhibit E**.

⁷ See, e.g., South Dakota Network, LLC, Tariff F.C.C. No. 1., Centralized Equal Access Service, 2014 Annual Access Tariff Filing, Description and Justification, at 2, attached as **Exhibit F**.

Sincerely,

G. David Carter
Innovista Law PLLC
1825 K Street, NW
Suite 508
Washington, D.C. 20006
(202) 869-1502
david.carter@innovistalaw.com

Darla Pollman Rogers
Riter, Rogers, Wattier, & Northrup, LLP
319 South Coteau Street
P.O. Box 280
Pierre, SD 57501
605-224-7889
dprogers@riterlaw.com

*Counsel for James Valley Cooperative
Telephone Co., James Valley Communications,
Inc. and Northern Valley Communications,
L.L.C.*

Counsel for South Dakota Network, LLC

Sara Imberi

From: NoReply_UJS@ujs.state.sd.us
Sent: Thursday, August 24, 2017 5:04 PM
To: Jim Cremer
Cc: Cheryl Holzwarth
Subject: Notification of Events Filed

06CIV15-000134

JAMES VALLEY COOPERATIVE TELEPHONE COMPANY,
JAMES VALLEY COMMUNICATIONS, INC, NORTHERN
VALLEY COMMUNICATIONS, LLC vs. SOUTH DAKOTA
NETWORK, LLC, MARK SHLANTA, MARK BENTON, ROD
BOWAR, JERRY HEIBERGER, DON SNYDERS, DENNIS
LAW, RANDY HOUDEK, BRYAN ROTH
Litigation
Brown
Myren, Scott P.

UPDATE: ORDER

(REJECTED) INVITIN THE FEDERAL COMMUNICATIONS
COMMISSION TO SUBMIT AN AMICUS CURIAE BRIEF ON
CERTAIN ISSUES
4:20:33 PM

UPDATE: ORDER

APPROVING PLAINTIFFS' PROPOSED REQUEST ORDER TO
AMICUS CURIAE BRIEF FROM THE FEDERAL
COMMUNICATIONS COMMISSION
4:22:37 PM

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jm

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF BROWN

FIFTH JUDICIAL CIRCUIT

JAMES VALLEY COOPERATIVE
TELEPHONE COMPANY, a South Dakota
cooperative; JAMES VALLEY
COMMUNICATIONS, INC., a South Dakota
corporation; and NORTHERN VALLEY
COMMUNICATIONS, L.L.C., a South
Dakota limited liability company,

Plaintiffs,

v.

SOUTH DAKOTA NETWORK, LLC, a South
Dakota limited liability company,

Defendant.

06CIV15-000134

**ORDER INVITING THE FEDERAL
COMMUNICATIONS COMMISSION
TO SUBMIT AN *AMICUS CURIAE*
BRIEF ON CERTAIN ISSUES**

In furtherance of its Memorandum Opinion dated July 17, 2017, and Order dated July 31, 2017, this Court recognizes that the parties' claims and defenses remaining for trial in this action directly bear upon issues of federal law and policy, specifically the Federal Communications Act. This Court recognizes that its ruling on the parties' claims and defenses has the potential to affect existing telecommunications law and policy. This Court hereby invites the Federal Communications Commission ("FCC") to submit an *amicus curiae* brief so as to allow this Court the benefit of the FCC's expertise and technical assistance regarding the application and interpretation of certain aspects of the Federal Communications Act and related FCC policy, including but not limited to determinations of the legality of a private contract between SDN and AT&T for a competitive transport service, SDN's 2014 cost study and federal tariff, alleged violations of the Federal Communications Act, and this Court's jurisdiction to consider dissolution of a company such as SDN that exists by virtue of a specific order from the FCC.

Having now considered the independent submissions of the parties, which submissions included both factual statements and legal questions, this Court invites the FCC to address the following questions:

1. Do competitive local exchange carriers (“CLECs”) engaged in access stimulation have an exclusive right to transport services between the CLEC’s service area and the interexchange carrier’s (“IXC’s”) point of interconnection?
2. May a provider of centralized equal access (“CEA”), like SDN, provide competitive transport services via contract?
3. Since Northern Valley Communications, LLC (“NVC”) is not a member of SDN, do the rights conferred in SDN’s 214 designation from the FCC, as well as the FCC’s CEA rules, apply to NVC?
4. Can a CLEC require an interexchange carrier (“IXC”) to use its tariffed service and does the CLEC have a lawful tariffed-based expectancy of future business free from competitive alternatives in the provision of access to IXCs from an IXC?
5. Does the FCC have plenary jurisdiction over wholly intrastate facilities carrying traffic that is interstate in nature?
6. Can SDN by private agreement confer upon NVC greater rights than those which are available to NVC under the Federal Communications Act, as amended, and FCC rules and policies?
7. Do either of the Plaintiffs have standing to challenge SDN’s compliance with the FCC’s cost support rules, specifically the traffic demand equation in SDN’s annual access filing 2014 cost study?
8. To the extent that the FCC answers the prior question in the affirmative, does a South Dakota state court have jurisdiction to address a dispute over an alleged violation of the FCC’s rules and whether it occurred?

The Court considers the following facts relevant to the questions set forth above:

1. SDN is a South Dakota limited liability Company.
2. SDN is a provider of CEA.
3. SDN’s federal operating authority derives from FCC authorization issued pursuant to section 214 of the Federal Communications Act, as amended (47 U.S.C. § 214) (1934).
4. In addition to its 214 authorization from the FCC, SDN operates pursuant to a limited liability company Operating Agreement between SDN and its seventeen ILEC members.
5. James Valley Cooperative Telephone Company, Inc., (“JVCTC”) is a local exchange carrier.
6. JVCTC is one of seventeen members of SDN.
7. NVC is a CLEC and sub-subsidiary of JVCTC.

8. NVC operates in part through rates obtained from, and facilities owned by, both JVCTC and SDN.
9. NVC engages in the practice of access stimulation and has filed a tariff with the FCC setting forth the terms and rates associated with that service.
10. The nature of the dispute concerns interstate traffic, terminating on transport facilities wholly within the state of South Dakota.
11. Stimulated traffic destined for NVC's service territory flowed through SDN's access tandem in Sioux Falls. A number of IXCs objected to not only NVC's access charges, but also SDN's, due to the volume of traffic. One of those IXCs, AT&T, disputed both NVC and SDN's access charges, withholding payment from both NVC and SDN. AT&T sought a more cost-efficient way of transporting NVC's stimulated traffic and AT&T, NVC, and SDN had months of discussions regarding a way in which to resolve their respective historical billing disputes and prospective handling of transport for stimulated traffic.
12. In September 2014, believing it had the agreement with NVC, SDN entered into a contract with AT&T, whereby SDN would provide the transport from SDN's access tandem switch in Sioux Falls to NVC's service territory for NVC's stimulated traffic. SDN would bill AT&T for the transport and then share equally those transport revenues with NVC. NVC would bill AT&T under NVC's tariff for local switching and local transport from Groton to Redfield. SDN billed AT&T at a lower transport rate for the stimulated traffic at issue. SDN understood it had an obligation to provide an IXC with relief from tariffed rates on access stimulation due to call volume and previous negotiations between the parties. NVC disputes that it accepted the terms of the agreement between SDN and AT&T.
13. The service SDN is providing to AT&T for the transport of NVC's stimulated traffic is a different service than that identified in SDN's federal tariff. The rate SDN charged to AT&T for the referenced traffic is not the same as the rate for CEA service contained in SDN's tariff. SDN only provides those terms for access stimulated traffic.
14. JVCTC and NVC have made claims in this lawsuit that AT&T is obligated to use NVC's tariffed access service and may not use, nor can another carrier provide, a competitive transport service option to AT&T. NVC asserts that it has and can enforce an expectancy of future business from carriers such as AT&T.
15. NVC's claimed right to transport interstate access traffic arises, inter alia, from its FCC tariff.
16. No tariff on file with the South Dakota Public Utilities Commission is in dispute in this action.
17. NVC has also alleged that SDN violated 47 C.F.R. § 61.38 when it filed with this Commission its 2014 federal tariff and supporting Tariff Review Plan.

Trial in this matter, absent further order of this Court, is set for March 19-30, 2018. This Court therefore requests that the FCC submit any *amicus curiae* brief prior to December 31, 2017. This Court considers the FCC's guidance regarding these issues to be of crucial signification to the full and fair resolution of the parties' claims and defenses in this case.

BY THE COURT:

Circuit Court Judge

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF BROWN

FIFTH JUDICIAL CIRCUIT

JAMES VALLEY COOPERATIVE
TELEPHONE COMPANY, a South Dakota
cooperative; JAMES VALLEY
COMMUNICATIONS, INC., a South Dakota
corporation; and NORTHERN VALLEY
COMMUNICATIONS, L.L.C., a South
Dakota limited liability company,

Plaintiffs,

v.

SOUTH DAKOTA NETWORK, LLC, a South
Dakota limited liability company,

Defendant.

06CIV15-000134

**ORDER APPROVING
PLAINTIFFS' PROPOSED
REQUEST ORDER
FOR AMICUS CURIAE BRIEF
FROM THE FEDERAL
COMMUNICATIONS COMMISSION**

In the Court's July 31, 2017, Order Granting, In Part, and Denying, In Part, Defendant's Motion to Dismiss and Alternative Motion to Stay Proceedings and Refer Issues to the Federal Communications Commission, the Court acknowledged that the Federal Communications Commission ("FCC") has primary jurisdiction in determining whether Defendant violated the Federal Communications Act, including the legality of the SDN/AT&T agreement and the cost study and alleged violations of tariffs. The Court granted Defendant's Alternative Motion to Stay and Refer Issues to the Federal Communications Commission only insofar as it permitted the parties to invite the FCC to provide an *amicus curiae* brief. The Court ordered the parties to meet and confer regarding the terms of a Request Order, and, in the event they could not reach an agreement, to submit to this Court their respective proposed Request Orders. The parties agreed that such orders would be submitted on or before August 22, 2017.

The Court has now received competing Request Orders submitted by the parties.

Pursuant to the Court's Memorandum Opinion of July 17, 2017, and the Court's July 31, 2017,


Order Granting, In Part, and Denying, In Part, Defendant's Motion to Dismiss and Alternative Motion to Stay Proceedings and Refer Issues to the Federal Communications Commission,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiffs' proposed Request Order, and the form of the letter attached hereto as **Exhibit 1**, comport with those prior orders and are hereby approved;
2. The parties shall cooperate in executing the letter and delivering it to the Office of General Counsel of the Federal Communications Commission; and
3. If, for any reason, Defendant refuses to execute the letter within three business days of the execution of this Order, Plaintiff is authorized to submit the letter, together with this Order, to the Office of General Counsel of the Federal Communications Commission.

BY THE COURT:

Signed: 8/24/2017 2:23:05 PM


Circuit Court Judge

Attest:
Walberg, Peggy
Clerk/Deputy



August __, 2017

VIA EMAIL

Jennifer Tatel, Esq.
Acting General Counsel
Federal Communications Commission
445 12th Street SW
Washington, DC 20554
(202) 418-1740
fcclitigation@fcc.gov

Re: *James Valley Cooperative Telephone Company, James Valley Communications, Inc., and Northern Valley Communications, L.L.C. v. South Dakota Network, LLC*, Civ. 15-134 (Brown County, SD Cir. Ct.): Invitation to Submit an *Amicus* Brief

Dear Ms. Tatel:

The undersigned are counsel to the parties in the above-captioned litigation. We write jointly in response to an order released by the Hon. Scott P. Myren, Circuit Judge, in the litigation directing the parties to invite the Federal Communications Commission to submit an *amicus* brief on certain discrete legal issues that are relevant to one of Plaintiffs' claims against South Dakota Network, LLC ("SDN"), a Commission-approved Centralized Equal Access ("CEA") Provider.¹

We note that while the Court entertained a motion asking for the case to be stayed and referred to the FCC, the Court opted instead to seek the Commission's view through *amicus* briefing on discrete questions that are narrowly tailored and framed as legal questions. The Commission's response to these questions will guide the Court in making determinations relevant to questions that remain pending before the Court, specifically whether Plaintiffs are entitled to seek dissolution or judicial intervention in the affairs of SDN in light of alleged violations of the FCC's rules governing the provision and tariffing of CEA services.

¹ See *James Valley Cooperative Telephone Company, James Valley Communications, Inc., and Northern Valley Communications, L.L.C. v. South Dakota Network, LLC*, Civ. 15-134, Memorandum Decision on Defendant's Motion to Stay Proceedings and Refer Issues to the Federal Communications Commission and Motion to Strike or Exclude the Opinions of Warren Fischer, Michael Starkey, and Barry Bell (Brown Cty. S.D. Cir. Ct. July 17, 2017), at 16-18, attached hereto as **Exhibit A**.

The relevant and undisputed facts are as follows:

1. As an FCC-sanctioned CEA provider,² SDN's interstate switched access tariff contains rates developed pursuant to part 61.38 of the Commission's rules governing rate-of-return carriers.
2. In September 2014, SDN entered into a contract with AT&T Corp. to provide AT&T with tandem switching and transport services for rates below those contained in SDN's FCC-filed tariff (the "SDN/AT&T Agreement").³
3. Neither AT&T nor SDN filed the SDN/AT&T Agreement with the Commission or otherwise made it publicly available.
4. The SDN/AT&T Agreement requires SDN to provide AT&T with "High Volume Switching and Transport Service," for long distance traffic AT&T terminates to Northern Valley Communications, LLC ("Northern Valley").
5. [REDACTED]
6. [REDACTED]
7. Northern Valley is a CLEC that provides services to residential and business customers in and around Aberdeen, South Dakota. Northern Valley also provides services to high-volume customers, including conference call providers. Northern Valley has a switched access tariff on file with the Commission and mirrors the rates in CenturyLink's tariff, as provided by the Commission's rules governing tariffed rates for CLECs engaged in access stimulation.

The Court has invited the Commission to provide an *amicus* brief responding to the following question:

For the period September 2014 to present, have the FCC's rules permitted an FCC-approved Centralized Equal Access Provider to provide tandem-switching services to an IXC pursuant to a private, unfiled contract, at a rate that is below the rate contained in the CEA Provider's FCC-filed tariff?

² See *In re: SDCEA, Inc. to Lease Transmission Facilities to Provide Centralized Equal Access Service to Interexchange Carriers in the State of South Dakota*, Memorandum Opinion, Order and Certificate, 5 FCC Rcd. 6978, DA 90-1654 (rel. Nov. 21, 1990).

³ AT&T/SDN Service Agreement, Confidential, September 18, 2014, attached as **Exhibit B**.

⁴ SDN Tariff F.C.C. No. 1, 7th Revised Page 134, attached as **Exhibit C** (Eff. July 1, 2014) (Access Transport rate is \$0.006001 and Centralized Equal Access is \$0.005802).

⁵ SDN Tariff F.C.C. No. 1, 8th Revised Page 134, attached as **Exhibit D** (Eff. July 1, 2016) (Access Transport rate is \$0.006001 and Centralized Equal Access is \$0.005122).

To the extent that the Commission answers the prior question in the negative, what portion(s) of the Communications Act or Commission rules are implicated by SDN's decision to enter into the unfiled, off-tariff contract with AT&T?

In addition to the issue of SDN's unfiled contract with AT&T, Plaintiffs have also learned that in preparation of SDN's 2014 CEA cost study, SDN significantly reduced the projected traffic volumes that would be switched by its tandem switch. The undisputed facts are as follows:

1. In its 2012 Tariff Review Plan, SDN projected it would switch 837,258,000 minutes⁶ of interstate long distance traffic for the study period.
2. In its 2014 Tariff Review Plan, SDN projected only 370,269,443 minutes⁷ of interstate long distance traffic for the study period.
3. A primary reason for SDN reducing the projected volumes is because AT&T had been withholding payment from SDN and SDN was preparing to enter into the off-tariff contract with AT&T described above.
4. AT&T's traffic to Northern Valley has continued to be switched by SDN's tandem switch after SDN entered into the SDN/AT&T contract.

Therefore, the Court has invited the Commission to provide an *amicus* brief responding to the following additional question:

Did SDN violate the Commission's rules governing rate development as an FCC-approved CEA provider by omitting traffic volumes related to AT&T traffic from its 2014 cost study, even though AT&T's traffic continued to be switched by SDN's tandem switch?

To the extent that the Commission answers the prior question in the affirmative, what portion(s) of the Communications Act or Commission rules are implicated by SDN's 2014 cost study filing?

We appreciate the assistance of your office in responding to these questions based on existing FCC law and look forward to your response. Should you require any additional information, please do not hesitate to contact the undersigned.

⁶ See, e.g., South Dakota Network, LLC, Tariff F.C.C. No. 1., Centralized Equal Access Service, 2012 Annual Access Tariff Filing, Description and Justification, at 3, attached as **Exhibit E**.

⁷ See, e.g., South Dakota Network, LLC, Tariff F.C.C. No. 1., Centralized Equal Access Service, 2014 Annual Access Tariff Filing, Description and Justification, at 2, attached as **Exhibit F**.

Sincerely,

G. David Carter
Innovista Law PLLC
1825 K Street, NW
Suite 508
Washington, D.C. 20006
(202) 869-1502
david.carter@innovistalaw.com

Darla Pollman Rogers
Riter, Rogers, Wattier, & Northrup, LLP
319 South Coteau Street
P.O. Box 280
Pierre, SD 57501
605-224-7889
dprogers@riterlaw.com

*Counsel for James Valley Cooperative
Telephone Co., James Valley Communications,
Inc. and Northern Valley Communications,
L.L.C.*

Counsel for South Dakota Network, LLC

REDACTED - FOR PUBLIC INSPECTION

Subject: JVCTC v. SDN - Request Order/Letter to FCC
Date: Friday, August 25, 2017 at 3:54:41 PM Eastern Daylight Time
From: Jim Cremer <jcremer@bantzlaw.com>
To: Darla Pollman Rogers (dprogers@riterlaw.com) <dprogers@riterlaw.com>
CC: Meredith Moore <meredithm@cutlerlawfirm.com>, Brian Donahoe <brian@donahoelawfirm.com>, David Carter <david.carter@innovistalaw.com>, Joseph Bowser <joseph.bowser@innovistalaw.com>
Attachments: 322 Order Approving Plaintiffs' Proposed Request Order for Amicus Curiae Brief from the FCC 2017-08-24 (01521232xB2D1A).pdf, Exhibits (A-F) to FCC Letter (01521518xB2D1A).pdf

Darla:

Pursuant to Judge Myren's August 24 Order adopting the Plaintiffs' Request Order, attached are the Order, the letter, and the exhibits referred to in the letter. Under the Order, SDN had three days (which expires on Tuesday) to sign the letter. Therefore, please sign the letter and return it to me and we will send it to FCC's acting general counsel along with the Order. Thank you.

Jim Cremer | Bantz, Gosch & Cremer, L.L.C.
305 Sixth Ave. SE | PO Box 970 | Aberdeen, SD 57402-0970
(605) 225-2232 | Fax (605) 225-2497

***** **CONFIDENTIALITY NOTICE** *****

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STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF BROWN

FIFTH JUDICIAL CIRCUIT

JAMES VALLEY COOPERATIVE
TELEPHONE COMPANY, a South Dakota
cooperative; JAMES VALLEY
COMMUNICATIONS, INC., a South Dakota
corporation; and NORTHERN VALLEY
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Dakota limited liability company,

Plaintiffs,

v.

SOUTH DAKOTA NETWORK, LLC, a South
Dakota limited liability company,

Defendant.

06CIV15-000134

**ORDER APPROVING
PLAINTIFFS' PROPOSED
REQUEST ORDER
FOR AMICUS CURIAE BRIEF
FROM THE FEDERAL
COMMUNICATIONS COMMISSION**

In the Court's July 31, 2017, Order Granting, In Part, and Denying, In Part, Defendant's Motion to Dismiss and Alternative Motion to Stay Proceedings and Refer Issues to the Federal Communications Commission, the Court acknowledged that the Federal Communications Commission ("FCC") has primary jurisdiction in determining whether Defendant violated the Federal Communications Act, including the legality of the SDN/AT&T agreement and the cost study and alleged violations of tariffs. The Court granted Defendant's Alternative Motion to Stay and Refer Issues to the Federal Communications Commission only insofar as it permitted the parties to invite the FCC to provide an *amicus curiae* brief. The Court ordered the parties to meet and confer regarding the terms of a Request Order, and, in the event they could not reach an agreement, to submit to this Court their respective proposed Request Orders. The parties agreed that such orders would be submitted on or before August 22, 2017.

The Court has now received competing Request Orders submitted by the parties.

Pursuant to the Court's Memorandum Opinion of July 17, 2017, and the Court's July 31, 2017,

REDACTED - FOR PUBLIC INSPECTION

James Valley Cooperative Telephone Company et al. v. South Dakota Network, LLC et al.

Brown County Civ. 15-134

Order Approving Plaintiffs' Proposed Request Order for Amicus Curiae Brief from the Federal Communications Commission

Order Granting, In Part, and Denying, In Part, Defendant's Motion to Dismiss and Alternative Motion to Stay Proceedings and Refer Issues to the Federal Communications Commission,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiffs' proposed Request Order, and the form of the letter attached hereto as **Exhibit 1**, comport with those prior orders and are hereby approved;
2. The parties shall cooperate in executing the letter and delivering it to the Office of General Counsel of the Federal Communications Commission; and
3. If, for any reason, Defendant refuses to execute the letter within three business days of the execution of this Order, Plaintiff is authorized to submit the letter, together with this Order, to the Office of General Counsel of the Federal Communications Commission.

BY THE COURT:

Signed: 8/24/2017 2:23:05 PM


Circuit Court Judge

Attest:
Walberg, Peggy
Clerk/Deputy



August __, 2017

VIA EMAIL

Jennifer Tatel, Esq.
Acting General Counsel
Federal Communications Commission
445 12th Street SW
Washington, DC 20554
(202) 418-1740
fcclitigation@fcc.gov

Re: *James Valley Cooperative Telephone Company, James Valley Communications, Inc., and Northern Valley Communications, L.L.C. v. South Dakota Network, LLC*, Civ. 15-134 (Brown County, SD Cir. Ct.): Invitation to Submit an *Amicus* Brief

Dear Ms. Tatel:

The undersigned are counsel to the parties in the above-captioned litigation. We write jointly in response to an order released by the Hon. Scott P. Myren, Circuit Judge, in the litigation directing the parties to invite the Federal Communications Commission to submit an *amicus* brief on certain discrete legal issues that are relevant to one of Plaintiffs' claims against South Dakota Network, LLC ("SDN"), a Commission-approved Centralized Equal Access ("CEA") Provider.¹

We note that while the Court entertained a motion asking for the case to be stayed and referred to the FCC, the Court opted instead to seek the Commission's view through *amicus* briefing on discrete questions that are narrowly tailored and framed as legal questions. The Commission's response to these questions will guide the Court in making determinations relevant to questions that remain pending before the Court, specifically whether Plaintiffs are entitled to seek dissolution or judicial intervention in the affairs of SDN in light of alleged violations of the FCC's rules governing the provision and tariffing of CEA services.

¹ See *James Valley Cooperative Telephone Company, James Valley Communications, Inc., and Northern Valley Communications, L.L.C. v. South Dakota Network, LLC*, Civ. 15-134, Memorandum Decision on Defendant's Motion to Stay Proceedings and Refer Issues to the Federal Communications Commission and Motion to Strike or Exclude the Opinions of Warren Fischer, Michael Starkey, and Barry Bell (Brown Cty. S.D. Cir. Ct. July 17, 2017), at 16-18, attached hereto as **Exhibit A**.

The relevant and undisputed facts are as follows:

1. As an FCC-sanctioned CEA provider,² SDN's interstate switched access tariff contains rates developed pursuant to part 61.38 of the Commission's rules governing rate-of-return carriers.
2. In September 2014, SDN entered into a contract with AT&T Corp. to provide AT&T with tandem switching and transport services for rates below those contained in SDN's FCC-filed tariff (the "SDN/AT&T Agreement").³
3. Neither AT&T nor SDN filed the SDN/AT&T Agreement with the Commission or otherwise made it publicly available.
4. The SDN/AT&T Agreement requires SDN to provide AT&T with "High Volume Switching and Transport Service," for long distance traffic AT&T terminates to Northern Valley Communications, LLC ("Northern Valley").
5. [REDACTED]
6. [REDACTED]
7. Northern Valley is a CLEC that provides services to residential and business customers in and around Aberdeen, South Dakota. Northern Valley also provides services to high-volume customers, including conference call providers. Northern Valley has a switched access tariff on file with the Commission and mirrors the rates in CenturyLink's tariff, as provided by the Commission's rules governing tariffed rates for CLECs engaged in access stimulation.

The Court has invited the Commission to provide an *amicus* brief responding to the following question:

For the period September 2014 to present, have the FCC's rules permitted an FCC-approved Centralized Equal Access Provider to provide tandem-switching services to an IXC pursuant to a private, unfiled contract, at a rate that is below the rate contained in the CEA Provider's FCC-filed tariff?

² See *In re: SDCEA, Inc. to Lease Transmission Facilities to Provide Centralized Equal Access Service to Interexchange Carriers in the State of South Dakota*, Memorandum Opinion, Order and Certificate, 5 FCC Rcd. 6978, DA 90-1654 (rel. Nov. 21, 1990).

³ AT&T/SDN Service Agreement, Confidential, September 18, 2014, attached as **Exhibit B**.

⁴ SDN Tariff F.C.C. No. 1, 7th Revised Page 134, attached as **Exhibit C** (Eff. July 1, 2014) (Access Transport rate is \$0.006001 and Centralized Equal Access is \$0.005802).

⁵ SDN Tariff F.C.C. No. 1, 8th Revised Page 134, attached as **Exhibit D** (Eff. July 1, 2016) (Access Transport rate is \$0.006001 and Centralized Equal Access is \$0.005122).

To the extent that the Commission answers the prior question in the negative, what portion(s) of the Communications Act or Commission rules are implicated by SDN's decision to enter into the unfiled, off-tariff contract with AT&T?

In addition to the issue of SDN's unfiled contract with AT&T, Plaintiffs have also learned that in preparation of SDN's 2014 CEA cost study, SDN significantly reduced the projected traffic volumes that would be switched by its tandem switch. The undisputed facts are as follows:

1. In its 2012 Tariff Review Plan, SDN projected it would switch 837,258,000 minutes⁶ of interstate long distance traffic for the study period.
2. In its 2014 Tariff Review Plan, SDN projected only 370,269,443 minutes⁷ of interstate long distance traffic for the study period.
3. A primary reason for SDN reducing the projected volumes is because AT&T had been withholding payment from SDN and SDN was preparing to enter into the off-tariff contract with AT&T described above.
4. AT&T's traffic to Northern Valley has continued to be switched by SDN's tandem switch after SDN entered into the SDN/AT&T contract.

Therefore, the Court has invited the Commission to provide an *amicus* brief responding to the following additional question:

Did SDN violate the Commission's rules governing rate development as an FCC-approved CEA provider by omitting traffic volumes related to AT&T traffic from its 2014 cost study, even though AT&T's traffic continued to be switched by SDN's tandem switch?

To the extent that the Commission answers the prior question in the affirmative, what portion(s) of the Communications Act or Commission rules are implicated by SDN's 2014 cost study filing?

We appreciate the assistance of your office in responding to these questions based on existing FCC law and look forward to your response. Should you require any additional information, please do not hesitate to contact the undersigned.

⁶ See, e.g., South Dakota Network, LLC, Tariff F.C.C. No. 1., Centralized Equal Access Service, 2012 Annual Access Tariff Filing, Description and Justification, at 3, attached as **Exhibit E**.

⁷ See, e.g., South Dakota Network, LLC, Tariff F.C.C. No. 1., Centralized Equal Access Service, 2014 Annual Access Tariff Filing, Description and Justification, at 2, attached as **Exhibit F**.

Sincerely,

G. David Carter
Innovista Law PLLC
1825 K Street, NW
Suite 508
Washington, D.C. 20006
(202) 869-1502
david.carter@innovistalaw.com

Darla Pollman Rogers
Riter, Rogers, Wattier, & Northrup, LLP
319 South Coteau Street
P.O. Box 280
Pierre, SD 57501
605-224-7889
dprogers@riterlaw.com

*Counsel for James Valley Cooperative
Telephone Co., James Valley Communications,
Inc. and Northern Valley Communications,
L.L.C.*

Counsel for South Dakota Network, LLC

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF BROWN

FIFTH JUDICIAL CIRCUIT

JAMES VALLEY COOPERATIVE
TELEPHONE COMPANY, a South Dakota
cooperative; JAMES VALLEY
COMMUNICATIONS, INC., a South Dakota
corporation; and NORTHERN VALLEY
COMMUNICATIONS, L.L.C., a South
Dakota limited liability company,

Plaintiffs,

v.

SOUTH DAKOTA NETWORK, LLC, a South
Dakota limited liability company,

Defendant.

CIV. 15-134
MEMORANDUM DECISION ON
DEFENDANT'S MOTION TO DISMISS
AND ALTERNATIVE MOTION TO STAY
PROCEEDINGS AND REFER ISSUES TO
THE FEDERAL COMMUNICATIONS
COMMISSION AND MOTION TO
STRIKE OR EXCLUDE THE OPINIONS
OF WARREN FISCHER, MICHAEL
STARKEY, AND BARRY BELL

Defendant filed, *inter alia*, Motion to Dismiss and Alternative Motion to Stay Proceedings and Refer Issues to the Federal Communications Commission, and Motion to Strike or Exclude the Opinions of Warren Fischer, Michael Starkey, and Barry Bell. A motions hearing was held on April 12, 2017 in the above entitled matter. Prior to the hearing, both parties submitted briefs to the Court. This Memorandum Decision constitutes the Court's ruling on the motions.

BACKGROUND

Defendant South Dakota Network, LLC (SDN) is a telecommunication carrier that provides, among other things, "Centralized Equal Access" or "CEA" service in South Dakota. James Valley Cooperative Telephone Company (JVT) is a member of SDN. JVT is an incumbent local exchange carrier ("ILEC") that provided telephone services in Brown County. JVT owns James Valley Communications, Inc. (JVC), which is the sole member of Northern

Valley Communications, LLC (NVC). NVC is a competitive local exchange carrier ("CLEC") that provides telecommunications and information services in certain areas of Brown and Spink Counties in northeastern South Dakota. NVC claims affiliate membership in SDN by virtue of JVT's membership. Since 1999, NVC has utilized the CEA services of SDN pursuant to lease agreements and other contracts between NVC and SDN.

The dispute between the parties arises from AT&T's withholding payments to NVC and SDN for access charges starting in 2013. In September 2014, SDN entered into an agreement ("SDN/AT&T Agreement") with AT&T which provided for a contract rate to provide transport for certain telecommunications traffic.

In March of 2015, Plaintiffs filed the present suit against SDN, its managers, and CEO Mark Shlanta. The claims against the managers and Shlanta were subsequently dismissed by this Court pursuant to Defendants' Motions. As a result, the only defendant that remains in this suit is Defendant SDN. The complaint against SDN includes Count I breach of Operating Agreement, Count II breach of contracts, Count IV intentional interference with business relationship, Count V violation of South Dakota Trade Regulation SDCL 37-1-4; Count VI unjust enrichment, Count VII conversion, Count VIII dissolution, and Count IX declaratory judgment.

Defendant¹ moves to dismiss all of Plaintiffs' claims or alternatively stay the proceeding and refer some issues to the Federal Communications Commission. It claims all of Plaintiffs' claims arise under federal law and are preempted. Alternatively, Defendant argues that the FCC has primary jurisdiction and urges this Court to stay the proceeding and refer federal issues to the FCC. Defendant also moves to strike or exclude the opinions of Warren Fischer, Michael Starkey, and Barry Bell.

¹ Defendants made the present motions before this Court issued rulings dismissing claims against Managers. Since other defendants were dismissed from the present case, Defendant SDN became the only party making the motion.

ANALYSIS AND DECISION

I. Preemption

A. Legal Standard

State courts have authority to determine whether a state law cause of action is preempted by federal law. *Boomsma v. Dakota, Minnesota & E. R.R. Corp.*, 2002 S.D. 106, ¶ 13, 651 N.W.2d 238, 242. “There is a strong presumption against federal preemption.” *In re Estate of Flaws*, 2016 S.D. 61, ¶ 17, 885 N.W.2d 580, 584. The party asserting preemption bears the burden to rebut that presumption. *Sunflour R.R., Inc. v. Paulson*, 2003 S.D. 122, ¶ 18, 670 N.W.2d 518, 523. (citing *Eldridge v. City of Greenwood*, 331 S.C. 398, 503 S.E.2d 191 (1998) with approval).

The framework for federal preemption is well settled. Generally, a state law claim may be preempted by federal law through express preemption or implied preemption. *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595, 191 L. Ed. 2d 511 (2015). Implied preemption includes field preemption and conflict preemption. *Id.* Field preemption applies when Congress intended to foreclose any state regulation in the *area*, irrespective of whether state law is consistent or inconsistent with federal standards. *Id.* (emphasis original). Conflict preemption, sometimes referred as ordinary preemption, “exists where ‘compliance with both state and federal law is impossible’, or where ‘the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Id.* (quoting *California v. ARC America Corp.*, 490 U.S. 93, 100, 101, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989)); *Tiede v. CorTrust Bank, N.A.*, 2008 S.D. 31, ¶ 16, 748 N.W.2d 748, 753.

B. Federal Question Jurisdiction

To support its proposition of federal preemption, Defendant reasons that all of the claims in dispute invoke substantial federal questions. However, the mere existence of a federal question cannot be conflated with federal preemption defense. Generally, the preemptive effect of a federal statute does not provide federal question jurisdiction.² *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 6, 123 S. Ct. 2058, 2062 (2003); *see also, Johnson v. MFA Petroleum Co.*, 701 F.3d 243, 248 (8th Cir. 2012) (“An assertion that a state claim is preempted by federal law ‘is a *defense* to ... [the] state law claim and not a ground for federal jurisdiction.’”) Either a state or federal court may entertain a federal preemption defense claim and dismiss the state law claim if preemption is warranted. *Carter v. Cent. Reg'l W. Virginia Airport Auth.*, No. 2:15-CV-13155, 2016 WL 4005932, at *16 (S.D.W. Va. July 25, 2016). Federal question jurisdiction, on the other hand, only renders a claim removable to a federal court. *See* 28 U.S.C. §1441 (articulating grounds for removal). The proper forum to address federal question jurisdiction is in a federal court on a removal and remand proceeding. *See* 28 U.S.C. §§ 1446-1447 (procedure for removal and remand). If a federal court exercises its jurisdiction, then it may decide whether claims are preempted. If a federal court declines jurisdiction and remands claims to state court, parties are free to raise a defense of federal preemption in state court. *See Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 947 (9th Cir. 2014) (articulating the proper procedure for claiming federal preemption in a state court).

² An exception to the general rule is the doctrine of complete preemption. *See Beneficial Nat. Bank*, 539 U.S. at 6, 123 S. Ct. at 2062. Complete preemption doctrine applies where the preemptive force of a federal statute is so “extraordinary” that it converts an ordinary state law claim into a federal claim and confers exclusive federal jurisdiction. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393, 107 S. Ct. 2425, 2430, 96 L. Ed. 2d 318 (1987); *Gore v. Trans World Airlines*, 210 F.3d 944, 949 (8th Cir. 2000). To that effect, complete preemption, in essence, is a jurisdictional doctrine rather than a preemption doctrine. *Dennis v. Hart*, 724 F.3d 1249, 1254 (9th Cir.2013). Because the parties agree that complete preemption does not apply to the FCA, this Court need not address this narrow exception.

Here, this Court has not received any notice of removal to federal court. Accordingly, this Court continues to exercise its concurrent jurisdiction, except for claims over which this Court lacks subject matter jurisdiction.

C. Artful Pleading Doctrine

Defendant emphatically argues that all of the claims raised by Plaintiffs are preempted under the artful pleading doctrine. Defendant's reading of the doctrine is overbroad. The artful pleading doctrine applies when the plaintiff has attempted to defeat removal by failing to plead a necessary federal question. *Chaganti & Associates, P.C. v. Nowotny*, 470 F.3d 1215, 1220 (8th Cir. 2006). The doctrine is applicable when federal law *completely* preempts a plaintiff's state law claim. *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475, 118 S. Ct. 921, 925, 139 L. Ed. 2d 912 (1998) (emphasis added). Indeed, courts have held complete preemption is prerequisite to the artful pleading doctrine. *Minnesota ex rel. Hatch v. Worldcom, Inc.*, 125 F. Supp. 2d 365, 369 (D. Minn. 2000); *Chaganti*, 470 F.3d at 1220–21 (refusing to apply the artful pleading doctrine because state law claim was not completely preempted); *Connolly v. Union Pac. R. Co.*, 453 F. Supp. 2d 1104, 1109 (E.D. Mo. 2006) ("The artful pleading doctrine is limited to federal statutes which 'so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal.'") Therefore, the artful pleading doctrine only applies in the context of complete preemption in support for removal proceeding. Because Defendant concedes that complete preemption does not apply in this case, the artful pleading doctrine is inapposite.

D. Ordinary Preemption under the FCA

With respect to the federal preemption defenses, Defendant concedes that only ordinary preemption applies. Accordingly, this Court does not address issues of express preemption and

field preemption. To determine whether a state law is preempted under ordinary preemption, the relevant test is “whether compliance with both laws is a ‘physical impossibility,’ or, whether the state law ‘stand[s] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Tiede*, 2008 S.D. 31, ¶ 16, 748 N.W.2d at 753 (alteration original). The ultimate determining factor is Congressional intent. *Boomsma*, 2002 S.D. 106, ¶ 15, 651 N.W.2d at 242.

Under the conflict test, courts consider the theory of each claim and determine “whether the legal duty that is the predicate” of that claim is inconsistent with the federal regulations. *Metropoulos Telecommunications, Inc. v. Glob. Crossing Telecommunications, Inc.*, 423 F.3d 1056, 1075 (9th Cir. 2005), *aff’d*, 550 U.S. 45, 127 S. Ct. 1513, 167 L. Ed. 2d 422 (2007). To determine whether a state law is an obstacle to a federal law, courts look to “both the objective of the federal law and the method chosen by Congress to effectuate that objective, taking into account the law’s text, application, history, and interpretation.” *Ting v. AT&T*, 319 F.3d 1126, 1137 (9th Cir. 2003).

Defendant cites §§ 201, 202 and 207 of the FCA to support its proposition for ordinary preemption. Section 201 declares unlawful any rates, terms, and conditions of telecommunication services that are not just and reasonable. *Boomer v. AT & T Corp.*, 309 F.3d 404, 418 (7th Cir. 2002); 47 U.S.C. § 201. Section 202 prohibits unjust or unreasonable discrimination by a common carrier. 47 U.S.C. § 202. Most courts have held that the uniformity principle embodied in §§ 201 and 202 preempts state law challenges to the rates, terms, and conditions of telecommunication services. *In re Universal Serv. Fund Tel. Billing Practice Litig.*, 619 F.3d 1188, 1197 and 1201 (10th Cir. 2010) (citing *In the Matter of Policy & Rules Concerning the Interstate, Interexchange Marketplace*, 12 F.C.C. Rcd. 15014 (1997), and

deferring to the FCC's determination regarding the preemption effect of §§ 201 and 202 following detariffing); *Boomer*, 309 F.3d at 418; *but see Ting*, 319 F.3d at 1139 (holding uniformity principle no longer existed following detariffing). Section 207 creates federal causes of action and confers federal government exclusive jurisdiction for violation of §§ 201 and 202, and other duties imposed by the FCA (47 U.S.C. § 207), but it does not serve to exclude state remedies. *New York by Schneiderman v. Charter Commc'ns, Inc.*, No. 17 CIV. 1428 (CM), 2017 WL 1755958, at *5 (S.D.N.Y. Apr. 27, 2017).

Rather, § 414 of the FCA expressly preserves preexisting state remedies against carriers, such as tort, breach of contract, negligence, fraud, and misrepresentation. *In the Matter of Operator Servs. Providers of Am. Petition for Expedited Declaratory Ruling*, 6 F.C.C. Rcd. 4475 (F.C.C. 1991); 47 U.S.C. § 414. It preserves causes of action for breaches of duties distinguishable from those created under the FCA. *Firstcom, Inc. v. Qwest Corp.*, 555 F.3d 669, 678 (8th Cir. 2009); *MCI Telecommunications Corp. v. Garden State Inv. Corp.*, 981 F.2d 385, 387 (8th Cir. 1992).

Defendant points to various allegations raised by Plaintiffs, including unlawfulness of the SDN/AT&T Agreement, unlawfulness of the cost study, and violations of tariffs. This Court acknowledges that it lacks subject matter jurisdiction over claims for violation of the FCA because the federal courts have exclusive jurisdiction to adjudicate these claims. However, lack of subject matter jurisdiction over these precise areas does not necessarily mean a state law claim must be dismissed.

E. Plaintiffs' Individual Claims

With the above principles in mind, this Court will address, in turn, each of the Plaintiff's state law claims.

I. Count I, Breach of Operating Agreement

Plaintiffs allege that Article 15 of the Operating Agreement required points of interconnection (POIs) to be established by agreement. Plaintiffs then allege Defendant's unilateral change of NVC's POI for AT&T traffic breached the Operating Agreement.

A breach of contract claim may be preempted by the FCA if the award or restitution of the contract claim would affect the rate, terms, and conditions of telecommunication service. *Ramette v. AT & T Corp.*, 351 Ill. App. 3d 73, 85, 812 N.E.2d 504, 513 (2004) (citing *Order on Reconsideration*, 12 F.C.C. Rep. at 15057). Conversely, a state law action that does not challenge the reasonableness of a rate, term or condition, (such as claims based on contract formation and breach of contract) is not preempted. *Manasher v. NECC Telecom*, No. 06-10749, 2007 WL 2713845, at *10 (E.D. Mich. Sept. 18, 2007), *aff'd in part*, 310 Fed. Appx. 804 (6th Cir. 2009). Here, Plaintiffs' claim is based on breach of contract. The claim does not challenge the rate, terms and conditions of telecommunication service. The resolution of the state law claims of breach of the Operating Agreement is not dependent on any duty created by the FCA.

Defendant claims a predicate question to this claim is whether the Operating Agreement can limit the right of AT&T (which is not a party to the Operating Agreement) to request a different POI with a CLEC. However, the Operating Agreement does not prevent AT&T from requesting a different POI with a CLEC. The Operating Agreement only controls the conduct of the parties to that agreement. If a party to that agreement commits a breach it may properly be held responsible for that breach.

Defendant's contention that a dispute about POI should be resolved by a federal court or the FCC is an example of arguing for federal question jurisdiction as noted above. However, the issue for this Court is federal preemption, not federal question jurisdiction. *See, Wisconsin v.*

AT&T Corp., 217 F. Supp. 2d 935, 938 (W.D. Wis. 2002) (“In the present context of a preemption argument, invocation of substantial federal issue jurisdiction would swallow the well-established rule that a conflict preemption defense does not support federal question jurisdiction.”)

The obstruction prong does not support Defendant’s proposition either. “Conflict preemption requires that the state or local action be a material impediment to the federal action, or thwart[] the federal policy in a material way.” *Mount Olivet Cemetery Ass’n v. Salt Lake City*, 164 F.3d 480, 489 (10th Cir.1998) (alteration original). Here, allowing state law to enforce a contract between communication carriers cannot be said to be a material impediment, as the FCC expressly acknowledged that state law still governs formation and breach of a contract. *Interstate Interexchange Marketplace*, 12 F.C.C. Rep. at 15057.

In addition, enforcement of the alleged contractual duty would not frustrate the purpose of the FCA or obstruct the means chosen by Congress. Post detariffing, the market-based mechanism of the federal regulations seems to encourage, rather than prohibit contract-based relationships. Defendant argues that allowing this claim to proceed would frustrate the FCC’s policy in promoting competition. However, it is undisputed that Defendant willingly entered into the Operating Agreement which Plaintiffs seek to enforce. Defendant does not provide sufficient explanation why enforcing such a voluntary agreement would be contrary to FCC policy. Defendant’s conclusory statement that it has such effect is insufficient to meet its burden to rebut the presumption against preemption. Accordingly, Plaintiffs’ breach of the Operating Agreement claim is not preempted by the FCA.

2. *Count II Breach of Contracts*

Likewise Plaintiffs' breach of contracts claim is not preempted. Regarding the breach of contracts claim, Plaintiffs' first theory is that the parties entered into a lease contract and that Defendant had an implied duty to refrain from interfering with NVC's ability to collect tariffed transport from long-distance carriers for transportation. Defendant argues such entitlement expectation or monopoly right would be in conflict with the FCC's policies. Defendant again does not sufficiently specify the policies announced by the FCC that would be inconsistent with enforcement of this contractual obligation.

Plaintiffs' second theory is that Defendant and NVC had contracts whereby Defendant agreed to provide services to NVC on the same terms and conditions as members. Under this theory, Defendant would have a contractual duty to treat NVC on equal footing as other members. Treating an affiliate like a member clearly does not violate § 202, which only prohibits unjust or unreasonable discrimination. The contractual duty, if proven, would demonstrate that Defendant voluntarily committed to a higher standard than the standard set forth in § 202. As such, that duty was created by a private contract, and is independent and distinguishable from the duty imposed by the FCA.

Under either theory, Plaintiffs do not challenge the rate, terms, and conditions of a telecommunication service agreement. The alleged contractual obligations do not frustrate the Congressional intent to promote competition either. "As in the context of ratemaking, where private contracts have replaced rigid rate prescriptions, state contract laws provide a background that is not only consistent with, but is integral to, the market-based mechanism of the federal regulations." *Metropoulos*, 423 F.3d at 1076.

Defendant's argument that the contracts are subject to the control and regulation of the FCC is just another argument for federal question jurisdiction. Defendant further argues that allowing the breach of contracts claim will render the FCA meaningless, but does not offer any sufficient explanation to justify that claim. As such, Defendant has failed to meet its burden.

3. *Count IV Intentional Interference with Business Relationship*

To establish a claim for tortious interference with a business relationship, Plaintiffs must allege an intentional and unjustified act of interference on the part of the interferer. *Selle v. Tozser*, 2010 S.D. 64, ¶ 15, 786 N.W.2d 748, 753. Courts consider the following factors in determining whether an interferer's conduct is improper: (1) the nature of the actor's conduct; (2) the actor's motive; (3) the interests of the other with which the actor's conduct interferes; (4) the interests sought to be advanced by the actor; (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other; and (6) the relations between the parties. *Id.*

To survive preemption, the act of interference must be independently wrongful and recognized by statute or common law as wrongful. *Zimmer Radio of Mid-Missouri, Inc. v. Lake Broad., Inc.*, 937 S.W.2d 402, 406 (Mo. Ct. App. 1997). A claim for interference with business relationship is preserved by the savings clause where the wrongful acts complained of constitute breaches of duties distinguishable from those created under the FCA. *Id.*

In *Harbor Broadcasting*, the plaintiff's complaint for tortious interference alleged that the defendant "failed and refused to take any steps whatsoever to comply with [an FCC order.] *Harbor Broad., Inc. v. Boundary Waters Broadcasters, Inc.*, 636 N.W.2d 560, 562 (Minn. Ct. App. 2001). The appellate court found that evaluating the claim would necessarily require scrutinizing the FCC order. *Id.* at 567. The court concluded that the claim necessarily implicated

and intertwined technical concerns best left to the FCC. *Id.* The court also concluded the controversy arose from the defendant's failure to comply with the FCC order under which the parties' rights and duties are determined. *Id.* at 569. The court then held the claim was impliedly preempted by the FCA due to irreconcilable conflict with the FCC's exclusive jurisdiction, and rights and duties indistinguishable from those created under the FCA. *Id.* at 570.

In the instance case, however, the wrongfulness of Plaintiffs' act is not predicated on violations of the FCA. Plaintiffs claim that Defendant violated the contractual intentions of its members and their affiliates and the obligation of good faith and fair dealing by obtaining new contracts with AT&T and diverting revenues due to NVC to members of Defendant. Plaintiffs also claim Defendant's act is based on improper motives, such as obtaining a settlement payment from AT&T, receiving compensation for transport services that Defendant did not provide, and increasing revenue from cell-site backhaul service. Based on these allegations, the Plaintiffs do not need to assert that Defendant violated the duties imposed by the FCA to support their claim for intentional interference. The alleged breach is not based on any duties imposed by the FCA. Evaluating the Plaintiffs' claim does not require this Court to scrutinize the SDN/AT&T Agreement or tariffs filed with the FCC. This action is not preempted because the alleged wrongful acts are not premised on duties or obligations imposed by the FCA.

4. *Count V Violation of South Dakota Trade Regulation SDCL 37-1-4*

With respect to the antidiscrimination claim, Plaintiffs assert that Defendant engaged in unfair discrimination by offering AT&T a lower rate for transporting calls for the part of the state served by NVC, as compared to any other parts of the state. Plaintiff claims this was an attempt to displace NVC as the regular established dealer of transport services from Sioux Falls to Groton. SDCL 37-1-4 prohibits unfair discrimination based on geographic locations for the

purpose of defeating or preventing competition. SDCL 37-1-3.5 exempts “noncompetitive and emerging competitive telecommunications service by public utilities pursuant to tariffs or schedules approved by the South Dakota Public Utilities Commission, or pursuant to any other federal or state regulatory authority...” The two state statutes read together show SDCL 37-1-4 regulates nonemerging competitive telecommunications service.

Section 202 prohibits unreasonable discrimination practices and services by a telecommunication carrier, including location based discrimination. 47 U.S.C. §202. The prohibition does not depend on whether a telecommunication service is provided pursuant to a filed tariff or a private contract. Thus, there is an overlapping area that SDCL 37-1-4 and § 202 both regulate—nonemerging competitive telecommunication service. Most courts have held the substantive antidiscrimination regulation in § 202 and related uniformity principle survived detariffing. *Universal Serv. Fund*, 619 F.3d at 1201 (surveying judicial and agency interpretation of § 202 both before and after detariffing); *cf. Ting*, 319 F.3d at 1139 (holding § 202 survived detariffing but the filed rate doctrine or uniformity principle did not). Under either the majority or minority rule, a state regulation that imposes a different standard of antidiscrimination is in conflict with § 202. The standard of antidiscrimination under SDCL 37-1-4 clearly is inconsistent with the standard of “unreasonable discrimination.” Therefore, Plaintiffs’ claim for violation of SDCL 37-1-4 is preempted. Accordingly, Count V of Plaintiffs’ claim is dismissed.

5. *Count VI Unjust Enrichment*

Plaintiffs’ unjust enrichment claim alleges that Defendant collected payments from AT&T for transport services that were actually being provided by NVC. Accordingly, Plaintiffs claim Defendant would be unjustly enriched if it was allowed to retain those funds. Defendant

asks this court to follow the ruling in *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1010 (9th Cir. 2010).

Telesaurus is distinguishable. In *Telesaurus*, the court preempted a state law unjust enrichment claim based on § 332 of the FCA. *Id.* The Court held § 332 expressly preempted state authorities to regulate rates and market entry in commercial mobile radio service. *Id.* The court there reasoned that the state law allegations would require the court to substitute its judgment for the FCC's regarding a licensing decision, a regulation of market entry.

Unlike § 332, §§ 201 and 202 contain no express preemption provision. The savings clause expressly preserves preexisting state law remedies. 47 U.S.C. § 414. Under the conflict preemption analysis, Plaintiffs' assertion is not premised on a breach of duty imposed by the FCA. A review of the nature and elements of the unjust enrichment convinces this Court that adjudication of this claim does not require Plaintiffs to prove that the SDN/AT&T agreement was unlawful or Defendant committed any wrong doings. The elements for unjust enrichment only include: (1) defendant received a benefit, (2) defendant was aware it was receiving a benefit, and (3) that it is inequitable to allow defendant to retain this benefit without paying for it. *Stern Oil Co. v. Border States Paving, Inc.*, 2014 S.D. 28, ¶ 18, 848 N.W.2d 273, 279. The duty to return benefits unjustifiably received thus is independently created by the state law and is distinguishable from the duty created by the FCA. The claim for unjust enrichment is not preempted.

6. Count VII Conversion

Plaintiffs' conversion claim alleges that NVC and Defendant had a lease agreement for capacity between Sioux Falls and Groton, and Defendant converted that capacity for its own use and benefit.

The elements of conversion include: (1) plaintiff owned or had a possessory interest in the property; (2) plaintiff's interest in the property was greater than the defendant's; (3) defendant exercised dominion or control over or seriously interfered with plaintiff's interest in the property; and (4) such conduct deprived plaintiff of its interest in the property. *W. Consol. Co-op. v. Pew*, 2011 S.D. 9, ¶ 22, 795 N.W.2d 390, 397.

Citing *Fetterman v. Green*, 455 Pa. Super. 639, 689 A.2d 289 (1997), Defendant argues the conversion claim is actually a claim for breach under § 202. This claim is distinguishable from *Fetterman*. In *Fetterman*, the court found the core of appellant's complaint alleged interference with radio signal transmissions, an area § 333 of the FCA expressly regulated. *Id.* at 645, 689 A.2d at 292-293; 47 U.S.C. § 333. Here, however, Defendant cannot re-characterize Plaintiffs' conversion claim as a breach of duty under § 202. First, it is unclear whether the lease and use of the transport capacity are regulated exclusively by the federal government as Defendant does not cite specific authorities to support its proposition. Second, § 202 does not determine whether Plaintiffs' interest in the property was greater than Defendant's, or prohibit Defendant from interfering with Plaintiffs' interest in the property. Therefore, the duty allegedly breached under the conversion claim is independent and distinguishable from the duty created by § 202. The conversion claim is not preempted.

Defendant's argument that the lease itself created no exclusive right is a defense beyond the scope of federal preemption. Defendant further argues that determination of whether NVC's interests were greater than Defendant's and whether Defendant deprived NVC of its superior interest must be determined within the context of the federal regulatory scheme. That argument, like other arguments for federal question jurisdiction, does not control the issue at hand: whether the conversion claim is in conflict with the FCA and thus preempted. It is not.

7. *Count VIII Dissolution*

Plaintiffs seek judicial dissolution of Defendant based on two theories pursuant to SDCL

47-34A-801(a)(4). The statute provides grounds for judicial dissolution, *inter alia*:

(iii) It is not otherwise reasonably practicable to carry on the company's business in conformity with the articles of organization and the operating agreement; or

(iv) The managers or members in control of the company have acted, are acting, or will act in a manner that is illegal or fraudulent.

Plaintiffs concede dissolution on the ground of illegal or fraudulent conduct by managers predicates on violations of the FCA. Plaintiffs assert alternatively that it is no longer reasonably practicable to carry on Defendant's business in conformity with its Articles of Organization and Operating Agreement. Defendant does not argue this individual claim is preempted, but maintains that this Court should refer the issue of violations of the FCA to the FCC. That alternative claim is not preempted.

8. *Count IX Declaratory Judgment*

Both parties agree that declaratory judgment depends on the determination of substantive claims. Because the Court concluded that not all of Plaintiffs' claims are preempted, this claim is not preempted.

II. Primary Jurisdiction

A. Legal Standard

Having determined Plaintiffs' claims are not all preempted, this Court must decide whether the FCC has primary jurisdiction over the remaining claims as Defendant argues.

Primary jurisdiction questions arise when both an administrative agency and a court have authority to hear an initial dispute. *Dan Nelson, Auto., Inc. v. Viken*, 2005 S.D. 109, ¶ 7, 706 N.W.2d 239, 242. This common law doctrine is used "to coordinate judicial and administrative decision making." *City of Osceola, Ark. v. Entergy Arkansas, Inc.*, 791 F.3d 904, 908-09 (8th

Cir. 2015) (quoting *Access Telecommunications v. Sw. Bell Tel. Co.*, 137 F.3d 605, 608 (8th Cir. 1998)). This doctrine operates to allow a court to refer a case to the appropriate administrative agency for initial decision. *Id.* Application of this doctrine is sparse due to the potential expense and delay which may result. *Id.* Under this doctrine, a court may either stay proceedings or dismiss the case without prejudice. *Unigestion Holding, S.A. v. UPM Tech., Inc.*, No. 3:15-CV-185-SI, 2017 WL 2129302, at *8 (D. Or. May 16, 2017).

In determining whether an administrative agency has primary jurisdiction over an issue, no fixed formula is available. *City of Osceola, Ark.*, 791 F.3d at 909. However, both parties rely on a four-factor test adopted by federal courts:

1. Whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise;
2. Whether the question at issue is particularly within the agency's discretion;
3. Whether there exists a substantial danger of inconsistent rulings; and
4. Whether a prior application has been made to the agency.

Advantel, LLC v. Sprint Commc'ns Co., 105 F. Supp. 2d 476, 480 (E.D. Va. 2000).

Applying these factors, this Court concludes a complete referral is unnecessary. First, Adjudication of these state law claims is within the conventional experience of judges. This Court is qualified to decide contractual and tort claims, as well as equitable remedies. Second, determination of whether these state law duties or contractual duties are breached is not within the FCC's discretion. The factual disputes are not highly technical in nature. For example, one critical factual dispute is whether the parties had an agreement during the Groton meeting.

Another factual dispute is whether there was an agreement or arrangement that prohibited Defendant from using the same transport capacity that NVC leased.

On the other hand, the FCC has primary jurisdiction in determining whether Defendant violated the FCA. These issues include: the legality of the SDN/AT&T agreement and the cost study and alleged violations of tariffs. While determination of these federal issues is not a prerequisite to the state law claims, inviting the FCC to submit an *amicus* brief balances the judicial economies and utilizes the benefit of agency expertise and experience. As such, the parties may invite the FCC to provide opinions regarding these issues in the form of an *amicus* brief, if that agency is so inclined.

With respect to the dissolution claim, the parties appear to agree it should not proceed with other claims. Plaintiffs suggest bifurcation while Defendant argues for referral. Therefore, the claim for dissolution is bifurcated and stayed pending determination of other claims.

III. Expert Opinions

This Court next determines whether the opinions proffered by Warren Fischer, Michael Starkey, and Barry Bell must be stricken or excluded.

Rule 702 governs the admissibility of expert testimony. SDCL 19-9-702.

Under this rule, before a witness can testify as an expert, that witness must be “qualified.” Furthermore, “[u]nder *Daubert*, the proponent offering expert testimony must show that the expert’s theory or method qualifies as scientific, technical, or specialized knowledge” as required under Rule 702. Before admitting expert testimony, a court must first determine that such qualified testimony is relevant and based on a reliable foundation. The burden of demonstrating that the testimony is competent, relevant, and reliable rests with the proponent of the testimony. The proponent of the expert testimony must prove its admissibility by a preponderance of the evidence.

Tosh v. Schwab, 2007 S.D. 132, ¶ 18, 743 N.W.2d 422, 428 (quoting *Burley v. Kytec Innovative Sports Equip., Inc.*, 2007 S.D. 82, ¶ 13, 737 N.W.2d 397, 402–03). Under Rule 702, this Court’s function is to determine whether an expert testimony will “assist the trier of fact to

understand the evidence or to determine a fact in issue.” *Burley*, 2007 S.D. 82, ¶ 16, 737 N.W.2d at 404 (quoting SDCL 19-15-2, predecessor of SDCL 19-19-702).

In this case, Defendant does not challenge the qualifications of Fischer, Starkey, and Bell. Defendant’s major challenge to the opinions of Fischer and Starkey is that they prescribe legal standards to be applied to the facts of this case.

The opinions of Warren Fischer are based on a review of the 2014 cost study that was developed by Defendant in support of its interstate access rates. Fischer opines that Defendant overstated the rate charged for its CEA service in its tariff. Based on this finding, Fischer concluded that AT&T was charged below cost under the SDN/AT&T Agreement, and was subsidized by other interexchange carriers that paid the CEA tariff rate.

Fischer’s opinions would prove that the 2014 cost study was unlawful, and that Defendant discriminated against other interexchange carriers, all in violation of the FCA. Because this Court lacks subject matter jurisdiction over claims for violations of the FCA, expert opinions regarding these issues would only serve to confuse the jury in its task of resolving the state law claims before this court. Accordingly, Fischer’s opinions are excluded.

Michael Starkey provides opinions regarding the SDN/AT&T Agreement. He opines that (1) the SDN/AT&T Agreement was not a standard agreement typical of agreements in the telecommunication industry; (2) Defendant’s provision of service between its Sioux Falls office and NVC’s Groton end office is inconsistent with standard industry practice, its own documentation, as well as rules of the FCC; (3) Defendant’s provision of services pursuant to the SDN/AT&T Agreement on an off-tariff basis was unlawful; (4) Defendant’s CEO and managers should have been aware that offering an exclusive and off-tariff contract for tandem switching services was contrary to the rules of the FCC.

For the same reason discussed above, Starkey's opinions are excluded to the extent they conclude that the SDN/AT&T Agreement was unlawful and inconsistent with rules of the FCC. Starkey's opinion regarding duties of the CEO and manager is also excluded because it is no longer relevant since dismissal of claims against them. However, Starkey is allowed to testify other aspects of the SDN/AT&T Agreement and the telecommunication industry in general.

With respect to the opinions proffered by Barry Bell, Defendant argues that they are speculative because they are based on the amounts AT&T has refused to pay Plaintiffs for the transport of traffic from Sioux Falls to Groton. However, the mere existence of the dispute between AT&T and NVC does not make Bell's damages calculations speculative. Neither does Bell's assumption that Defendant would be liable render his opinions speculative. His opinions regarding damages are relevant to the case, and the weight and credibility to be assigned to such opinions are properly within the province of the jury. *See Johnson v. Schmitt*, 309 N.W.2d 838, 842 (S.D. 1981). Accordingly, Bell's expert opinions are not excluded.

CONCLUSION


Defendant's motion to dismiss is granted in part and denied in part. Specifically, the motion to dismiss Count V is granted; the motion to dismiss Count I, II, IV, VI, VII, VIII, and IX is denied. Defendant's alternative motion to stay and refer issues to the FCC is granted in part and denied in part. The motion to stay Count VIII is granted; the parties may invite the FCC for an *amicus* brief on the issues whether Defendant violated any provision of the FCA; the remaining motion is denied.

Defendant's motion to strike or exclude the opinions of Warren Fischer is granted; the motion to strike or exclude the opinions of Michael Starkey is granted in part, denied in part; and the motion to strike or exclude the opinions of Barry Bell is denied.

Counsel for Plaintiffs shall submit any necessary Orders to effectuate these decisions.

DATED this 14th day of July, 2017.

BY THE COURT:



Scott P. Myren
Circuit Judge

ATTEST:

Marla R. Zastrow, Clerk of Courts

By: _____, Deputy Clerk

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CENTRALIZED EQUAL ACCESS SERVICE

6. Switched Access Service (Cont'd)6.8 Rates and Charges6.8.1 Usage and Nonrecurring Rates

	Rate Per Access Minute	
(A) <u>Access Transport</u>	\$0.006001	
	Rate Per Call Blocked	
(B) <u>Network Blocking Charge</u>	\$0.0271	
	Rate Per Access Minute	
(C) <u>Centralized Equal Access</u>	\$0.005802	(R)
	Rate Per Order	
(D) <u>Interim NXX Translation</u>	\$181.00	

Issued: June 24, 2014

Effective: July 1, 2014

By: Chief Executive Officer
2900 West 10th Street

REDACTED - FOR PUBLIC INSPECTION

Sioux Falls, South Dakota 57104

EXHIBIT C - Page 1 of 1

EXHIBIT 3 - Page 38 of 44

CENTRALIZED EQUAL ACCESS SERVICE

6. Switched Access Service (Cont'd)6.8 Rates and Charges6.8.1 Usage and Nonrecurring Rates

	Rate Per Access Minute	
(A) <u>Access Transport</u>	\$0.006001	
	Rate Per Call Blocked	
(B) <u>Network Blocking Charge</u>	\$0.0271	
	Rate Per Access Minute	
(C) <u>Centralized Equal Access</u>	\$0.005122	(R)
	Rate Per Order	
(D) <u>Interim NXX Translation</u>	\$181.00	

Issued: June 24, 2016

Effective: July 1, 2016

By: Chief Executive Officer
 2900 West 10th Street
 Sioux Falls, South Dakota 57104

**SOUTH DAKOTA NETWORK, LLC
TARIFF F.C.C. NO. 1
CENTRALIZED EQUAL ACCESS SERVICE
2012 ANNUAL ACCESS TARIFF FILING
DESCRIPTION AND JUSTIFICATION**

The accompanying tariff material includes descriptions of the corporate background and structure of South Dakota Network, LLC (SDN), the purpose of the present tariff filing, the tariffed services offered, the tariff support materials provided and the process employed by SDN to determine its interstate revenue requirement and calculate its proposed rates.

CORPORATE BACKGROUND

South Dakota Network, Inc., a South Dakota corporation, was incorporated on December 14, 1988. In 1999, the corporation merged with and into South Dakota Network, LLC, a South Dakota limited liability company. SDN provides centralized equal access and related services to interexchange carriers (IXCs) in rural areas of South Dakota. Its centralized equal access system has been fully operational since August 11, 1992. SDN operates a digital access tandem switch, fiber optic lines and other transmission facilities necessary to provide centralized equal access service. SDN is wholly-owned by the South Dakota independent local exchange carriers (ILECs) that participate in its centralized equal access project. For purposes of SDN's interstate access tariff, these participating ILECs are referred to as Routing Exchange Carriers (RECs). The stock of SDN is presently owned by the following 20 South Dakota ILECs:

- Beresford Municipal Telephone Company
- Swiftel Communications
- CRST Telephone Company
- City of Faith Municipal Telephone
- Golden West Telecommunications Cooperative, Inc.
- Interstate Telecommunications Cooperative, Inc.
- James Valley Cooperative Telephone Company
- Kennebec Telephone Company, Inc.
- TrioTel Communications
- Midstate Communications, Inc.
- RC Communications, Inc.
- Roberts County Telephone Cooperative Association
- Santel Communications Cooperative, Inc.
- Alliance Communications Cooperative
- Stockholm-Strandburg Telephone Company
- Venture Communications Cooperative
- Valley Telecommunications Cooperative Association, Inc.
- West River Cooperative Telephone Company
- West River Telecom Cooperative
- Western Telephone Company

None of these participating ILECs owns a majority or controlling ownership interest in SDN.

PURPOSE OF FILING

The purpose of this tariff filing is to update SDN's Access Transport and Centralized Equal Access rate elements.

SERVICES OFFERED

SDN offers Feature Group A, Feature Group B and Feature Group D switched access services to interexchange carriers at its centralized equal access tandem switch in Sioux Falls, South Dakota.

RATE STRUCTURE

SDN's Centralized Equal Access Services offering is comprised of two basic rate elements: a Centralized Equal Access Service element and an Access Transport element. SDN's Centralized Equal Access Service rate element constitutes its charge for the concentration and distribution services provided by and through its centralized equal access tandem switch. This charge is assessed on a per minute of use basis for both originating and terminating traffic between Routing Exchange Carriers and IXC's. It applies to all three Feature Groups in both originating and terminating directions. SDN's Access Transport rate element comprises its charge for transporting an IXC customer's traffic in either an originating or terminating direction between SDN's centralized equal access tandem switch (where the IXC customer's point of termination is located) and a Routing Exchange Carrier's point of interconnection. This charge is not distance sensitive, but rather is assessed on a per minute of use basis for both originating and terminating traffic. The Access Transport element is charged only when SDN provides transport facilities between the access tandem switch and the Routing Exchange Carrier's end offices.

RATE DEVELOPMENT

SDN's interstate revenue requirement is projected for the July 1, 2012, through June 30, 2013, test year. This revenue requirement was determined by using a mechanized jurisdictional separation system, which incorporates Part 36 of the FCC Rules and Regulations. Part 36 is used to develop the interstate portions of forecasted investment and expense. The interstate portion of investment and expenses derived from Part 36 was then allocated between the Centralized Equal Access Service rate element and the Access Transport rate element utilizing a Part 69 cost allocation system. Part 69 assigns the interstate data to the various cost elements. Return on investment was determined using an 11.25 percent rate and income taxes were computed and included so as to obtain SDN's total interstate revenue requirement. Separate demand estimates were derived for the Centralized Equal Access Service and Access Transport rate elements. These estimates include both originating minutes of use and terminating minutes of use. Forecasted miscellaneous revenues were subtracted from the total interstate revenue requirement to determine the access revenue requirement. The access revenue requirement was allocated between Centralized Equal Access Service and Access Transport and then divided by forecasted demand for each element to produce the proposed tariffed rate for each element. The calculations and results of this process are shown in SDN's Section 61.38 cost support, which accompanies this filing. Dividing SDN's projected access revenue requirement for Centralized

Equal Access service of \$4,871,553 by the projected minutes of use of 837,258,000, produces a proposed Centralized Equal Access Service rate of \$0.005818. Dividing SDN's projected access revenue requirement for Access Transport of \$18,501 by the projected minutes of use of 3,082,730, produces a proposed Access Transport rate of \$0.006001.

**SOUTH DAKOTA NETWORK, LLC
TARIFF F.C.C. NO. 1
CENTRALIZED EQUAL ACCESS SERVICE
2014 ANNUAL ACCESS TARIFF FILING
DESCRIPTION AND JUSTIFICATION**

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CORPORATE BACKGROUND

South Dakota Network, Inc., a South Dakota corporation, was incorporated on December 14, 1988. In 1999, the corporation merged with and into South Dakota Network, LLC, a South Dakota limited liability company. SDN provides centralized equal access and related services to interexchange carriers (IXCs) in rural areas of South Dakota. Its centralized equal access system has been fully operational since August 11, 1992. SDN operates a digital access tandem switch, fiber optic lines and other transmission facilities necessary to provide centralized equal access service. SDN is wholly-owned by the South Dakota independent local exchange carriers (ILECs) that participate in its centralized equal access project. For purposes of SDN's interstate access tariff, these participating ILECs are referred to as Routing Exchange Carriers (RECs). The stock of SDN is presently owned by the following 19 South Dakota ILECs:

- Beresford Municipal Telephone Company
- Swiftel Communications
- CRST Telephone Company
- City of Faith Municipal Telephone
- Golden West Telecommunications Cooperative, Inc.
- Interstate Telecommunications Cooperative, Inc.
- James Valley Cooperative Telephone Company
- Kennebec Telephone Company, Inc.
- TrioTel Communications
- Midstate Communications, Inc.
- RC Communications, Inc.
- Roberts County Telephone Cooperative Association
- Santel Communications Cooperative, Inc.
- Alliance Communications Cooperative
- Venture Communications Cooperative
- Valley Telecommunications Cooperative Association, Inc.
- West River Cooperative Telephone Company
- West River Telecom Cooperative
- Western Telephone Company

None of these participating ILECs owns a majority or controlling ownership interest in SDN.

PURPOSE OF FILING

The purpose of this tariff filing is to update SDN's centralized Equal Access rate..

SERVICES OFFERED

SDN offers Feature Group D switched access services to interexchange carriers at its centralized equal access tandem switch in Sioux Falls, South Dakota.

RATE STRUCTURE

SDN's Centralized Equal Access Services offering is comprised of two basic rate elements: a Centralized Equal Access Service element and an Access Transport element. SDN's Centralized Equal Access Service rate element constitutes its charge for the concentration and distribution services provided by and through its centralized equal access tandem switch. This charge is assessed on a per minute of use basis for both originating and terminating traffic between Routing Exchange Carriers and IXC's. It applies to both originating and terminating directions. SDN's Access Transport rate element comprises its charge for transporting an IXC customer's traffic in either an originating or terminating direction between SDN's centralized equal access tandem switch (where the IXC customer's point of termination is located) and a Routing Exchange Carrier's point of interconnection. This charge is not distance sensitive, but rather is assessed on a per minute of use basis for both originating and terminating traffic. The Access Transport element is charged only when SDN provides transport facilities between the access tandem switch and the Routing Exchange Carrier's end offices.

RATE DEVELOPMENT

SDN's interstate revenue requirement is projected for the July 1, 2014, through June 30, 2015, test year. This revenue requirement was determined by using a mechanized jurisdictional separation system, which incorporates Part 36 of the FCC Rules and Regulations. Part 36 is used to develop the interstate portions of forecasted investment and expense. The interstate portion of investment and expenses derived from Part 36 was then allocated between the Centralized Equal Access Service rate element and the Access Transport rate element utilizing a Part 69 cost allocation system. Part 69 assigns the interstate data to the various cost elements. Return on investment was determined using an 11.25 percent rate and income taxes were computed and included so as to obtain SDN's total interstate revenue requirement. Separate demand estimates were derived for the Centralized Equal Access Service and Access Transport rate elements. These estimates include both originating minutes of use and terminating minutes of use. Forecasted miscellaneous revenues were subtracted from the total interstate revenue requirement to determine the access revenue requirement. The access revenue requirement was allocated between Centralized Equal Access Service and Access Transport and then divided by forecasted demand for each element to produce the proposed tariffed rate for each element. The calculation and results of this process are shown in SDN's Section 61.38 cost support, which accompanies this filing. Dividing SDN's projected access revenue requirement for Centralized Equal Access service of \$2,148,404 by the projected minutes of use of 370,269,443 produces a proposed Centralized Equal Access Service rate of \$0.005802.

Law Offices

BLOOSTON, MORDKOFKY, DICKENS, DUFFY & PRENDERGAST, LLP

2120 L Street, NW, SUITE 300
WASHINGTON, DC 20037

BENJAMIN H. DICKENS, JR.*
JOHN A. PRENDERGAST
GERARD J. DUFFY
RICHARD D. RUBINO
MARY J. SISAK
D. CARY MITCHELL
SALVATORE TAILLEFER, JR.

(202) 659-0830
FACSIMILE: (202) 828-5568

February 7, 2018

AFFILIATED SOUTH AMERICAN OFFICES

ESTUDIO JAUREGUI & ASSOCIATES
BUENOS AIRES, ARGENTINA

HAROLD MORDKOFKY
OF COUNSEL

EUGENE MALISZEWSKYJ
ENGINEERING CONSULTANT

ARTHUR BLOOSTON
1914 – 1999

*ALSO ADMITTED IN FLORIDA

WRITER'S CONTACT INFORMATION

Thomas M. Johnson, Jr., General Counsel
Richard K. Welch, Deputy Associate General Counsel
William Scher, Trial Attorney
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: *James Valley Cooperative Telephone Company, James Valley Communications, Inc., and Northern Valley Communications, L.L.C. v. South Dakota Network, LLC*, CIV. 15-134 (Brown County, SD Cir. Ct.) (the "NVC Lawsuit")
Invitation to Submit an Amicus Brief

Dear Mr. Johnson:

South Dakota Network, LLC ("SDN"), by its counsel, hereby responds to the letter filed on behalf of James Valley Cooperative Telephone Company ("JVCTC"), James Valley Communications, Inc. ("JVC"), and Northern Valley Communications, L.L.C. ("NVC") (jointly referred to as "Plaintiffs") by Plaintiffs' counsel on September 1, 2017, inviting the Commission to submit an *amicus curiae* brief in the above-referenced state court proceeding. SDN is a Commission licensee as a Centralized Equal Access Provider by virtue of its Section 214 authorization under the Communications Act of 1934, as amended and the Commission's rules, and is a defendant in that role in the NVC Lawsuit. In the time since September 1, 2017, SDN has been actively litigating the matter. A jury trial in the state court action presently is scheduled to commence on March 19, 2018 in Aberdeen, SD. The trial, set in the county where both JVCTC and NVC reside, requires that certain federal regulations and laws be addressed, as explained below.

In March 2015, Plaintiffs filed suit in Circuit Court in South Dakota against SDN, its CEO, and Managers. Although filed in state court, the majority of the claims presented in the complaint are under the exclusive jurisdiction of the Commission. However, instead of referring the federal issues to the proper jurisdiction, as requested by SDN, Plaintiffs and the South Dakota Circuit Court ("State Court") have requested the Commission's Office of General Counsel ("OGC") to make legal conclusions based on alleged "undisputed" and incomplete facts. By doing so, they seek to short circuit the Communications Act and the Commission's

rules and policies by precluding an investigation by the Commission to determine the relevant facts before legal conclusions are drawn. They also seek to usurp the Commission's authority to determine whether or not a telecommunications carrier's continued provision of interstate service is in the public interest. For these reasons, OGC should not opine on the questions presented in Plaintiffs' letter.

However, Plaintiffs' letter and its complaint in the NVC Lawsuit present important questions of federal law that the Commission should address. In order to provide the Commission with an appropriate avenue for reviewing the federal issues presented in the NVC Lawsuit, SDN has filed with the Commission a Petition for Expedited Declaratory Ruling ("Petition") in which it asks the Commission to declare (a) that the Commission has jurisdiction over interstate traffic and associated facilities; (b) that a contract between SDN and an interexchange carrier ("IXC"), entered into for the purpose of terminating large volumes of traffic bound to a competitive local exchange carrier ("CLEC") engaged in access stimulation or "traffic pumping", is lawful under the Communications Act of 1934, as amended (the "Act"); and (c) that CLECs enjoy no *de jure* right to transport terminating traffic to their end offices insulated from competition. By filing the Petition, SDN has properly presented to the Commission the issues in the state matter over which the Commission has plenary authority. Rather than filing an *amicus* brief, the OGC should advise the Court to stay the NVC Lawsuit pending the Commission's release of an Order addressing the issues raised in SDN's Petition.

I. Factual Background

SDN provides centralized equal access ("CEA") services pursuant to this Commission's Section 214 authority,¹ through which SDN's individual owners – all rural incumbent local exchange carriers ("ILECs") – provide to rural telecommunications customers located in South Dakota a competitive choice of IXCs providing interstate and intrastate services. Under SDN's Section 214 authorization,² the rural ILECs' access traffic is aggregated and centralized at SDN's tandem switch in Sioux Falls, South Dakota.³ The ILEC members provide the transport service from the SDN switch to their end office switches. In addition to switching the traffic of its rural *incumbent* local exchange carrier owners, rural *competitive* local exchange carriers ("CLECs")

¹ In Re: Application of SDCEA, Inc., 5 FCC Rcd 6978 (FCC 1990) ("214 Authorization").

² SDN was also authorized to provide intrastate centralized equal access on behalf of its rural ILEC owners by the South Dakota Public Utilities Commission. *See In the Matter of Application of South Dakota Network, Inc. for Permission to Construct Centralized Equal Access Facilities*, Amended Order Granting Construction Permit and Approving Tariff, Docket F-3860, dated April 12, 1991.

³ This concentration of demand has proved successful. Specifically, efficiencies resulting in lower operating costs of SDN's member ILECs for a number of services, including SS7, CNAM, video transport from a centralized headend, Internet (now with DDoS mitigation), Home/Farm automation support, and Network Marketing support for regional network RFPs that support rural telehealth, regional banking, State Circuit Courts, schools and Governmental facilities from the smallest communities up through and including services for the Federal Government, all emerged from this aggregation and centralization. SDN will once again create efficiencies later this year as the network initiates its transition to IP switching.

affiliated with ILEC owners of SDN use the SDN CEA switching functions as part of their interstate and intrastate transport services.

One of SDN's member-ILECs, JVCTC, is affiliated with NVC. NVC, a CLEC, is not a member of SDN. As the Commission is well aware, NVC has been involved in access stimulation for many years.⁴ NVC's access stimulation scheme has had a material, negative impact upon SDN's business. Since 2009, most major interexchange carriers have disputed SDN's invoices that contain billing for access services associated with stimulated traffic. These disputes have resulted in SDN being forced to enter into protracted negotiated settlements for both payment in arrears and for prospective rates.

In March 2013, AT&T stopped paying NVC access charges for stimulated traffic. A month later, AT&T stopped paying SDN's CEA tandem switching charges for stimulated traffic associated with NVC. These withheld access charges included significant amounts for interstate traffic, which constitute the vast majority of AT&T's total terminating traffic to NVC's conference bridge customers per month.

Numerous efforts were made to resolve the non-payment disputes between SDN and AT&T and NVC and AT&T. These included efforts by SDN to explore alternative transport options for AT&T on a prospective basis, with lower SDN transport rates for high volume, stimulated traffic. SDN filed revisions to its interstate tariff to address these high-volume concerns and later, in lieu of tariff revisions, SDN developed a contract option. In September 2014, SDN entered into a services contract with AT&T for transport of terminating traffic from SDN's facilities in Sioux Falls, South Dakota to NVC's switch in Groton, South Dakota ("SDN-AT&T Agreement"). From the meet point in Groton, South Dakota, NVC transports and terminates the traffic to its conference bridge customers, and assesses AT&T its tariffed rates. The agreement between SDN and AT&T for the transport of stimulated traffic is the underlying issue of the claims set forth in Plaintiffs' complaint against SDN.⁵

Since it is clear from the record that the Commission has plenary authority over the claims, SDN filed a motion requesting the State Court refer the federal issues raised in Plaintiffs' complaint to the Commission for resolution. In its Memorandum and Opinion on SDN's motion, the State Court opined:

[T]he FCC has primary jurisdiction in determining whether Defendant violated the FCA. These issues include: the legality of

⁴ See *Qwest Communications Corp. v. Northern Valley Communications*, 26 FCC Rcd 8332 (FCC 2011), *reconsideration denied*, 26 FCC Rcd 14520 (FCC 2011) (*Northern Valley Order*) and *Sprint Communs. Co. L.P. v. Northern Valley Communs.*, 26 FCC Rcd 10780 (FCC 2011), *petitions for review consolidated and denied*, *N. Valley Communs., LLC v. FCC*, 717 F.3d 1017, 1019 (D.C. Cir. 2013)(cataloging NVC tariff filings, which were rejected, seeking to evade FCC rule for "end users" to be charged a fee by CLECs in order to assess interstate access charges against IXC's).

⁵ *James Valley Cooperative Telephone Company, et al., v. South Dakota Network, LLC, et al.*, Case No.: 06CIV15-000134 (S.D. 5th Cir.).

the SDN/AT&T agreement and the cost study and alleged violations of tariff. While determination of these federal issues is not a prerequisite to the state law claims, inviting the FCC to submit an *amicus* brief balances the judicial economics and utilizes the benefit of agency expertise and experience. As such, the parties may invite the FCC to provide opinions regarding these issues in the form of an *amicus* brief, if that agency is so inclined.⁶

Although the State Court found the Commission to have primary jurisdiction over the core issues set forth in the complaint, the State Court, on advice of Plaintiffs' counsel, opted merely to seek an *amicus* brief from the Commission in connection with only one count in Plaintiffs' complaint; namely, whether the State Court should dissolve SDN if it finds SDN to have violated provisions of the Act or rules of the Commission bearing upon the contract that SDN has executed and the validity of SDN's cost study submitted to the Commission several years ago, and not challenged by any SDN IXC customer or the Commission. Finally, SDN is now, on the eve of trial, faced with new and evolving claims that SDN's provision of transport service for AT&T access traffic unlawfully deprived NVC of tariff charges because some IXCs other than AT&T may have used the SDN-AT&T Agreement for transit (alleging that AT&T offered "wholesale" transport at its lower rate with SDN). In short, NVC seeks to control competition and rates for transport of interstate access traffic in an effort to become the most attractive destination for companies that would provide free conference calling or other end uses furthering access stimulation.

II. Before Placing SDN in Jeopardy, the Facts must be Determined

SDN urged the Court to refer the claims to the Commission, instead of seeking an *amicus* brief, because the Commission must determine the relevant facts before deciding if SDN has violated the Act or the Commission's rules. Plaintiffs' letter inviting the Commission to submit an *amicus* brief seeks to prejudge the result by selectively presenting a few statements as undisputed facts when, in fact, most of the statements are not undisputed facts and certain necessary facts are not presented at all.

Plaintiffs are well aware that SDN disputes the alleged undisputed facts. SDN's pleadings and expert testimony in the NVC Lawsuit make this clear. In addition, on August 29, 2017, counsel for SDN directly informed counsel for Plaintiffs that SDN disputed the alleged undisputed facts stated in the letter; however, Plaintiffs' counsel proceeded with submitting the letter containing the inaccurate information to the OGC. Moreover, there are many material facts necessary to an analysis of whether SDN has violated the Act and the Commission's rules, as alleged by Plaintiffs, which have not been presented to the Commission for consideration. As noted in the accompanying Petition for Declaratory Ruling, NVC is free to air its factual

⁶ See Attachment A of the included Petition for Declaratory Ruling: Memorandum Decision on Defendant's Motion to Dismiss and Alternative Motion to Stay Proceedings and Refer Issues to the Federal Communications Commission and Motion to Strike or Exclude the Opinions of Warren Fischer, Michael Starkey, and Barry Bell at page 18, *James Valley Cooperative Telephone Company, et al., v. South Dakota Network, LLC, et al.*, No. 15-134 (S.D. 5th Cir. July 17, 2017).

allegations in an appropriate Section 208 complaint proceeding. Therefore, the Commission should not opine on the questions presented in Plaintiffs' letter but, instead, address the legal issues over which it has jurisdiction through SDN's filed Petition.

III. Plaintiffs and the State Court Seek to Usurp the Commission's Plenary Authority

Although cloaked in South Dakota statutory and common law claims,⁷ as discussed in greater detail in SDN's Petition, Plaintiffs' complaint asks the State Court to make findings contrary to the Act, Commission's rulings, and Commission's pro-competitive policies. Plaintiffs' counts, when read together, seek to require AT&T to use NVC's tariffed transport service and pay its tariffed transport rate for terminating traffic from Sioux Falls to Groton, South Dakota⁸ and to prohibit SDN from providing a terminating transport option to AT&T pursuant to contract or tariff. Essentially, NVC is asserting an interstate transport monopoly for stimulated traffic between Sioux Falls, South Dakota and Groton, South Dakota⁹. Additionally, the complaint not only requests the State Court to rule on issues regarding interstate traffic, over which the Commission has plenary jurisdiction, but also includes a claim requesting the State Court to dissolve SDN or to impose restrictions on SDN's Section 214 authorization to operate as an interstate telecommunications carrier.

The intrusion of Plaintiffs' state court lawsuit into this Commission's jurisdiction is clear. As is well known, the dividing line between the regulatory jurisdictions of the Commission and states depends on "the nature of the communications which pass through the facilities [and not

⁷ Among other things, NVC alleges that SDN interfered with payments to which NVC is entitled pursuant to its "federal tariff"; the Service Agreement struck between SDN and AT&T was discriminatory because it replaced a proposed tariff amendment that SDN withdrew; the Service Agreement (which covers interstate traffic by its terms) caused a breach of an operating agreement between SDN and its members and their affiliates (i.e., James Valley and NVC), specifically an implied contract term evidently believed by NVC to award it an interstate transport monopoly; and SDN intentionally interfered with NVC's business relationship with AT&T.

⁸ Groton is the headquarters of NVC's parent ILEC, JVCT. JVTC supposedly operates a tandem switch connecting and terminating traffic to the town of Redfield, SD, which is in NVC's service area and in which its traffic stimulating customers are apparently located.

⁹ For instance, the complaint asserts that NVC and its two affiliates refused to relinquish NVC's "right" to transport AT&T's traffic; that SDN "attempted to force NVC to relinquish its existing rights to collect tariffed access charges;" and that SDN interfered with NVC's "expectancy of future business with AT&T pursuant to NVC's tariffs." NVC's rationale for its protected status in the interstate transport market is thin (as one would expect). NVC has argued variously, that its "right" to transport arises because its tariff was "deemed lawful," that SDN promised to accord NVC "the same terms and conditions" which apply to NVC's ILEC owner and SDN's other owners (and thus implicitly agreed that NVC has an exclusive transport arrangement), and that the Commission's *Connect America Fund Order* cemented, in an unspecified way, NVC's exclusive transport rights. Taken together, NVC is effectively asserting a monopoly transport right in its complaint that violates more than two decades of Commission policy governing the access market. See Attachment B of the included Petition for Declaratory Ruling.

on] the physical location of the lines.”¹⁰ Interstate and foreign communications are “totally entrusted to the FCC.”¹¹ The Commission has “plenary and comprehensive regulatory jurisdiction over interstate and foreign communications.”¹² “Congress vested in [the Commission] plenary jurisdiction to regulate the instrumentalities and facilities used in the transmission and reception of interstate communications.”¹³ Indeed, the Commission’s jurisdiction has been upheld over physically intrastate terminal equipment even against evidence that “[a]pproximately 97% of telephone calls” were **intrastate**.¹⁴

Additionally, SDN operates as a CEA provider under the Commission’s Section 214 authorization. The Commission has exclusive jurisdiction to grant Section 214 authority to a carrier to provide or discontinue interstate services. To allow a state court to have the authority to determine whether to dissolve an entity that was created, and has been continuously regulated under the Act and Commission’s rules and policies, potentially places the State Court’s judgment in conflict with the Commission’s. The Commission oftentimes finds that a carrier’s tariff is not in compliance with the Commission’s rules or that some other action by a carrier violates the Act or the Commission’s rules. Yet the Commission has not revoked the carrier’s authority to operate. For example, the Commission found in the *Northern Valley Order* that NVC’s tariff was unlawful and violated Section 201(b) of the Act in connection with access stimulation services, but it did not revoke NVC’s blanket 214 authority. Accordingly, any ruling on SDN’s Section 214 authorization should be made by the Commission and not by a state court with the only guidance being an *amicus* brief based upon disputed and incomplete facts.

The State Court has acknowledged that the alleged unlawfulness of the SDN-AT&T Agreement permeates all of Plaintiffs’ state court claims. Specifically, at the hearing on SDN’s motion to refer the federal issues to the Commission, the Court stated, “But you’ve [Plaintiffs] brought up the unlawfulness of that [SDN-AT&T] contract in all of these causes of action, not just the dissolution.”¹⁵ However, the State Court declined to refer the issue to the Commission and plans to proceed with a jury trial on the claims by prohibiting the parties from discussing the legality of the SDN-AT&T Agreement. With this issue pervading all of the state court claims, it will be extremely difficult for the parties to properly present their case to a jury. A Commission ruling on the legality of the SDN-AT&T Agreement and SDN’s claims in its Petition that NVC is attempting to enforce an unlawful transport monopoly, is necessary prior to a jury trial.

¹⁰ *National Ass’n of Regulatory Util. Com’rs v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) quoting *California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978).

¹¹ *National Ass’n of Regulatory Util. Com’rs* at 1501.

¹² *Telerent Leasing Corp. et al.*, 45 FCC 2d 204, 217 (1974), *aff’d sub nom. North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976).

¹³ *Ortho-O-Vision, Inc. Petition for Declaratory*, 69 FCC 2d 657, 666 (1978).

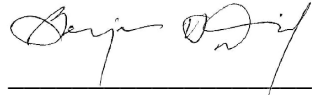
¹⁴ See *North Carolina Utilities Commission, et al. v. FCC*, 552 F.2d 1036, 1044 fn. 7 (4th Cir. 1977).

¹⁵ Motions Hearing at page 32, lines 3-5, *James Valley Cooperative Telephone Company, et al., v. South Dakota Network, LLC, et al.*, No. 15-134 (S.D. 5th Cir. April 12, 2017). Attached.

III. Action Requested

For the reasons discussed herein, SDN contends that the OGC should not opine on the alleged undisputed facts and questions presented in Plaintiffs' September 1, 2017 letter. With the filing of the Petition, SDN has placed before the Commission the federal issues at the core of each of the claims set forth in Plaintiffs' state court complaint. Through the Petition process, the Commission will have the opportunity to thoroughly review all relevant federal issues in the NVC Lawsuit. Additionally, a ruling on SDN's Petition prior to the commencement of a jury trial will minimize any risk for conflicting rulings from the State Court and the Commission. Accordingly, SDN respectfully requests that OGC ask the State Court to stay the NVC Lawsuit until the Commission has reviewed and ruled on SDN's Petition for Expedited Declaratory Ruling.

Respectfully submitted,



Benjamin H. Dickens, Jr.

Mary J. Sisak

Salvatore Taillefer

Counsel for South Dakota Network, LLC

1 for having operated in a manner that is unlawful.

2 The dissolution question --

3 THE COURT: But you've brought up the unlawfulness of that
4 contract in all of these causes of action, not just the
5 dissolution.

6 MR. CARTER: Well, I think that we have discussed that the
7 agreement that SDN is operating outside of the bounds of its
8 authority. But if you look --

9 THE COURT: Well, you clearly said it was part of the
10 breach of the contract, breach of the operating agreement
11 claim.

12 MR. CARTER: Well, Your Honor, we said that the breach of
13 the operating agreement claim relates to section 15.1 of the
14 operating agreement, and it related to the, to the obligation
15 of the managers to ensure that SDN is operating in a lawful
16 fashion.

17 Your ruling dismissing the managers takes that issue out
18 of the case such that the claim for breach of operating
19 agreement is a state law claim that looks at whether section
20 15.1 of the operating agreement required SDN to establish
21 points of interconnection at agreed points.

22 I do not believe, and I reject the suggestion that's been
23 made repeatedly, that in order for us to succeed on our
24 claims, we must first establish that the SDN-AT&T agreement
25 was unlawful under federal law.